86-563

No.

Supreme Court, U.S.
FILED
OCT 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

ANTONIO CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,

Petitioner,

vs.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation,

Respondents.

APPENDIX

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APPENDIX A—ORDER OF THE SUPREME COURT DATED JULY 21, 1986

SUPREME COURT OF THE UNITED STATES

No. A-37

ANTONIO CIPOLLONE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ROSE D. CIPOLLONE, DECEASED,

Applicant,

v.

LIGGETT GROUP, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including October 6, 1986.

s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 21st
day of July, 1986.

APPENDIX B—SUR PETITION FOR REHEARING DATED MAY 9, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-5073 and 85-5074

ANTONIO CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,

v.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation and LOEW'S THEATRES, INC., a New York Corporation

Liggett Group, Inc., Appellant in 85-5073
Loew's Theatres, Inc.; Appellant in 85-5074

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, GIBBONS, HUNTER, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*

The petition for rehearing filed by ANTONIO CIPOLLONE in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the

petition for rehearing is denied. Judges Gibbons and Mansmann would grant the petition for rehearing.

By the Court,

s/ James Hunter III
Judge

Dated: May 9, 1986

APPENDIX C—AMENDED JUDGMENT DATED APRIL 7, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5073 and 85-5074

ANTONIO CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,

v.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation and LOEW'S THEATRES, INC., a New York Corporation

Liggett Group, Inc., *Appellant in 85-5073*
Loew's Theatres, Inc., *Appellant in 85-5074*

(D.C. Civil No. 83-2864)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY — NEWARK

Present: HUNTER and SLOVITER, *Circuit Judges,* and GILES, *District Judge**

AMENDED JUDGMENT

This cause came on to be heard on the record from the United

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* Hon. James T. Giles, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix C

States District Court for the District of New Jersey—Newark and was argued by counsel February 13, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered September 24, 1984 as amended December 11, 1984 and certified to this Court pursuant to 28 U.S.C. § 1292(b), be, and the same is hereby reversed to the extent that it granted the Cipollones' motion to strike appellants' preemption defenses. It is further ordered that the cause be remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellee in both cases.

ATTEST:

s/ Sally Mrvos
Clerk

April 7, 1986

APPENDIX D—OPINION OF UNITED STATES COURT OF APPEALS, THIRD CIRCUIT DATED APRIL 7,1986

Antonio CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone

v.

LIGGETT GROUP, INC., a Delaware Corporation; Philip Morris Incorporated, a Virginia Corporation and Loew's Theatres, Inc., a New York Corporation.

Appeal of LIGGETT GROUP, INC.,
Appellant in 85-5073

Appeal of LOEW'S THEATRES, INC.,
Appellant in 85-5074

Nos. 85-5073, 85-5074.

United States Court of Appeals,
Third Circuit

Argued Feb. 13, 1986.

Decided April 7, 1986.

As Amended April 18, 1986.

Rehearing and Rehearing In Banc
Denied May 9, 1986.

Before HUNTER, SLOVITER, Circuit Judges, and GILES,* District Judge.

---

* Honorable James T. Giles, United States District Judge for the District of Eastern Pennsylvania, sitting by designation.

Appendix D

OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge.

This case, before the court on the district court's certification pursuant to 28 U.S.C. § 1292(b) (1982), presents the question whether the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (1982) (the "Act"), preempts any or all of the state common law claims brought by appellee Antonio Cipollone and his wife Rose in the district court. Several of the claims in the Cipollones' complaint concern the alleged failure of the defendants, Liggett Group, Inc., Philip Morris Incorporated, Loews Corporation, Loew's Theatres, Inc. ("Lorillard"), to provide an adequate warning of the dangers of the cigarettes that they manufactured and sold. Because these claims implicate the legislatively mandated warning provided in section 1333 of the Act, the answers of Liggett Group, Philip Morris, and Lorillard each included a defense based on the preemptive effect of the Act. The Cipollones responded by filing a motion to strike the preemption defenses. Lorillard, later joined by Philip Morris, then moved for judgment on the pleadings pursuant to Federal Rule Civil Procedure 12(c). Holding that the Act preempted none of the Cipollones' claims, the district court granted the Cipollones' motion to strike the defenses and denied the motion for judgment on the pleadings. *Cipollone v. Liggett Group, Inc.*, 593 F.Supp. 1146, 1171 (D.N.J. 1984). On January 21, 1984, this court granted appellants Lorillard and Liggett Group permission to appeal.[1] Because we disagree with the district court's

---

1. Liggett Group petitioned for leave to appeal only from the portion of the district court's order granting the Cipollones' motion to strike defenses. *See* Joint Appendix at A205. Lorillard sought leave to appeal from the entire

(Cont'd)

conclusion concerning the preemptive effect of the Act, we will reverse the district court's grant of the motion to strike and will remand the case for further proceedings.

I.

A. The Complaint

In their complaint, Rose and Antonio Cipollone alleged that Mrs. Cipollone developed lung cancer as a result of smoking cigarettes manufactured and sold by appellants. The complaint, which was originally filed on August 1, 1983, further averred that Mrs. Cipollone began smoking in 1942 and developed lung cancer as a result of her smoking. Mrs. Cipollone died in October 1984, but her husband has continued prosecuting this action, individually and as executor of his wife's estate. Mr. Cipollone is therefore the sole appellee in this case.

As observed by the district court, the fourteen-count complaint sets forth claims based on strict liability (Counts 2, 3, and 9), negligence (Counts 4 and 5), breach of warranty (Count 7), and intentional tort (Counts 6 and 8). The Cipollones claimed that the defendants' cigarettes were unsafe and defective (Count 2) and that defendants are subject to liability for their failure to warn of the hazards of cigarette smoking on the basis of negligence (Count 4) or strict liability (Count 3). In addition,

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(Cont'd)
order, which included a denial of its motion for judgment on the pleadings. *See* Joint Appendix at A203. Nevertheless, both appellants made clear in their reply brief and at oral argument that they did not challenge the district court's denial of Lorillard's motion for judgment on the pleadings. *See* Reply Brief of Appellants at 3; Transcript of Oral Argument at 7, 18. We will therefore consider only the district court's grant of the motion to strike.

the Cipollones asserted, defendants negligently (Count 5) or intentionally (Count 6) advertised their products in a manner that neutralized the warnings actually provided, warnings made meaningless by the addiction created by cigarettes (Count 9). Finally, the complaint stated that the defendants ignored, failed to act upon, and conspired to deprive the public of medical and scientific data reflecting the dangers associated with cigarettes (Count 8).[2]

B. The Federal Cigarette and Advertising Labeling Act

The Federal Cigarette and Advertising Act, originally enacted in 1965, was a response to a growing awareness among members of federal as well as state government that cigarette smoking posed a significant health threat to Americans. The original Act required the following warning label on cigarette packages: "Caution: Cigarette Smoking May Be Hazardous to Your Health." 15 U.S.C. § 1333 (1970). Congress changed this warning, by amendment to the Act in 1969, to the following: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." 15 U.S.C. § 1333 (1976).[3] The Act, as amended

---

2. Counts 1 and 10 through 14 are not pertinent to this appeal.

3. In 1984, Congress replaced this warning with rotational warnings providing:

> SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
>
> SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
>
> SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.

(Cont'd)

in 1970, expressly stated the policy behind the required warning:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (1982).[4]

(Cont'd)

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333(a)(1) (Supp. II. 1984). The 1984 warning, however, has limited relevance here because the complaint contains no allegation that Mrs. Cipollone smoked cigarettes manufactured and sold by any defendant after 1981.

4. Congress amended paragraph one of section 1331 in 1984 by adding a reference to warning notices in cigarette advertisements. Paragraph one now (Cont'd)

Appendix D

The Act also contains a preemption provision, which provides that

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334 (1982). Confronted with this provision, the district court did not question that the Act prohibits state legislatures from requiring a warning on cigarette packages that alters that provided in section 1333. Nevertheless, after a comprehensive analysis of the Act, the court concluded that section 1334 does not preempt state common law claims such as those that the Cipollones have asserted.

II.

A. Preemption Principles

The United States Supreme Court has identified several principles for ascertaining congressional intent to preempt state

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(Cont'd)
provides: "(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes. . . " 15 U.S.C. § 1331(1) (Supp. II 1984).

authority. To begin, Congress may preempt state law by express statement. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Without the aid of express language, a court may find intent to preempt in two general ways. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984). First, a court may determine that Congress intended "to occupy a field" in a given area

> because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."

Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). Second, in those instances where Congress has not wholly superceded state regulation in a specific area, state law is preempted "to the extent that it actually conflicts with federal law." *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1982). The Court has stated that such conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248

(1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Finally, in applying these principles, a court must be mindful of the overriding presumption that "Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981); *see also Rice,* 331 U.S. at 230, 67 S.Ct. at 1152.

B. Express Preemption

In applying these principles to the statutory scheme at issue here, we first express our agreement with the district court's conclusion that section 1334 does not provide for express preemption of the Cipollones' state common law claims. *See Cipollone,* 593 F.Supp. at 1154-55; *accord Roysdon v. R.J. Reynolds Tobacco Co.,*623 F.Supp. 1189, 1190 (E.D.Tenn. 1985); *Roysdon v. R.J. Reynolds,* No. 3-84-606, slip op. at 2 (E.D.Tenn. Dec. 11, 1985). Because we are constrained by the presumption against preemption, we cannot say that the language of section 1334 clearly encompasses state common law. We find support for this determination in Congress's failure to include state common law explicitly within section 1334, as it has in numerous other statutes.[5] Indeed, in the absence of a preemption provision

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5. Examples of statutes that include a preemption provision explicitly encompassing state common law include 12 U.S.C. §§ 1715z-17(d), 1715z-18(e) (Supp. II 1984) (Domestic Housing and International Recovery and Financial Stability Act); 17 U.S.C. § 301(a) (Copyright Act of 1976); and 29 U.S.C. § 1144(a), (c)(1) (1982) (Employee Retirement Income Security Act of 1974).

It should be noted that just as Congress could have included a reference to preemption of state common law in section 1334, it also could have included

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encompassing state common law, the Supreme Court has relied generally on principles of implied preemption in evaluating whether a statutory scheme preempts state common law. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984); *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). Accordingly, we turn to examining whether congressional intent to preempt the Cipollones' claims may be inferred under the two general principles of implied preemption.

C. Implied Preemption

In pressing their implied preemption arguments in this appeal, each side relies extensively on the legislative history of the Act. As is often the case with legislative history, both sides have succeeded in gleaning passages that bolster their contrary positions. Although we find the legislative history to the Act informative, no materials have come to our attention that we deem wholly dispositive of the issue before us. Even more important, we find the language of the statute itself a sufficiently clear expression of congressional intent without resort to the Act's legislative history. *See Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26, 97 S.Ct. 926, 941, 51 L.Ed.2d 124 (1977).

Under the principles of implied preemption, we must first

(Cont'd)

a "savings clause" explicitly preserving the continued vitality of state common law, such as that in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4) (1982). Thus, lack of reference to preemption of state common law in section 1334 has significance only because of the presumption against preemption.

determine whether Congress intended "to occupy the field" relating to cigarettes and health to the exclusion of state law product liability actions such as the Cipollones. Our examination of the Act leads us to agree with the district court's statements that "Congress . . . intended to occupy *a* field" and "indicated this intent as clearly as it knew how." *Cipollone*, 593 F.Supp. at 1164 (emphasis in original). Not only did Congress use sweeping language in describing the preemptive effect of the Act in section 1334, but it expressed its desire in section 1331 to establish "a comprehensive Federal program" in order to avoid "diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." *See Palmer v. Liggett & Myers Tobacco, Inc.*, 635 F.Supp. 392 (D.Mass. 1984) (Congress has preempted field with respect to cigarette labeling).

In determining the scope of this field, we observe that the Cipollones' tort action concerns rights and remedies traditionally defined solely by state law. We therefore must adopt a restrained view in evaluating whether Congress intended to supercede entirely private rights of action such as those at issue here. *See Rice*, 331 U.S. at 230, 67 S.Ct. at 1152; *Cipollone*, 593 F.Supp. at 1165-66; *see also Silkwood*, 104 S.Ct. at 623-24; *Florida Avocado Growers*, 373 U.S. at 143-44, 83 S.Ct. at 1211. In light of this constraint, we cannot say that the scheme created by the Act is "so pervasive" or the federal interest involved "so dominant" as to eradicate all of the Cipollones' claims. Nor are we persuaded that the object of the Act and the character of obligations imposed by it reveal a purpose to exert exclusive control over every aspect of the relationship between cigaretts and health. *See Banzhaf v. F.C.C.*, 405 F.2d 1082, 1089-91 (D.C.Cir. 1968), *cert. denied*, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed.2d 93 (1969); *see also Southern Railway Co. v. Railroad Commission of Indiana*, 236 U.S. 439, 446-48,

35 S.Ct. 304, 305-06, 59 L.Ed. 661 (1915). Thus, we look to the extent to which the Cipollones' state law claims "actually conflict" with the Act to ascertain whether they are preempted.

The test enunciated by this court for addressing a potential conflict between state and federal law requires us "to examine first the purposes of the federal law and second the effect of the operation of the state law on these purposes." *Finberg v. Sullivan,* 634 F.2d 50, 63 (3d Cir. 1980) (in banc) (citing *Perez v. Campbell,* 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971)). As mentioned above, Congress has provided us with an explicit statement of the Act's purposes in section 1331. That statement reveals that the Act represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy. *See Banzhaf,* 405 F.2d at 1090. Moreover, the preemption provision of section 1334, read together with section 1331, makes clear Congress's determination that this balance would be upset by either a requirement of a warning other than that prescribed in section 1333 *or* a requirement or prohibition based on smoking and health "with respect to the advertising or promotion" of cigarettes. *See* 15 U.S.C. § 1334.

Having identified the purposes of the Act, we now must evaluate the effect of the operation of state common law claims on these purposes. In so doing, we accept the appellants' assertion that the duties imposed through state common law damage actions have the effect of requirements that are capable of creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines,* 312 U.S. at 67, 61 S.Ct. at 404; *see also Dawson v. Chrysler Corp.*, 630 F.2d 950, 962 (3d Cir. 1980) (liability under common law has the effect of imposing requirements), *cert. denied,* 450 U.S. 959, 101 S.Ct.

1418, 67 L.Ed.2d 383 (1981). As the appellants point out, several Supreme Court opinions reflect recognition of the regulatory effect of state law damage claims and their potential for frustrating congressional objectives. *See, e.g., Fidelity,* 458 U.S. at 156-59, 102 S.Ct. at 3024-25; *Chicago & North Western Transportation Co.,* 450 U.S. at 324-25, 101 S.Ct. at 1133-34; *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959).[6] Applying this principle, we conclude that claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act.

Based on the foregoing, we hold that the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages[7] or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. We further hold that where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

---

6. The district court noted that *Garmon* involved claims based on state statutes, rather than state common law. This distinction does not undermine the significance of *Garmon.* As the appellants argue, the central inquiry should be whether a state statute or common law rule providing for civil liability is regulatory in its effect. The *Garmon* Court ruled that a claim for compensation has a regulatory nature and therefore may be preempted by a federal regulatory scheme. *Garmon,* 359 U.S. at 247-48, 79 S.Ct. at 780-81.

7. *Accord Roysdon,* at 1190-91 (1985); *Roysdon,* slip op. at 3 (Dec. 11, 1985).

Appendix D

As appellants' counsel conceded at oral argument, it is not necessary at this stage of the litigation for us to identify which of the Cipollones' claims are preempted by the Act. Under 28 U.S.C. § 1292(b), we are obliged to address the order that was certified rather than the controlling question of law framed by the district court.[8] *Johnson v. Alldredge*, 488 F.2d 820, 822-23 (3d Cir. 1973), *cert. denied*, 419 U.S. 882, 95 S.Ct. 148, 42 L.Ed.2d 122 (1974); *see, e.g., Murphy v. Heppenstall Co.*, 635 F.2d 233, 235 n. 1 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142, 102 S.Ct. 999, 71 L.Ed.2d 293 (1982). The district court's statement of the controlling issue appears to call for a definitive ruling on each of the Cipollones' claims. Nevertheless, we need only decide whether the district court's ruling striking appellants' preemption defenses should be affirmed or reversed.[9] Two principles counsel

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8. Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

9. In *Johnson*, we stated that section 1292(b) "does not speak of the court of appeals deciding a question certified by the district court. . . Since under the clear terms of section 1292(b), we are called upon not to answer the question certified but to decide an appeal, we do not find ourselves bound by the District Judge's statement of the issue." 488 F.2d at 822-23.

us to take such an approach. First, a court should avoid a holding of preemption that is premised on a merely potential conflict between state and federal law. *See Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 3298, 73 L.Ed.2d 1042 (1982). In addition, a court should not grant a motion to strike a defense unless the insufficiency of the defense is "clearly apparent." *See May Department Stores Co. v. First Hartford Corp.*, 435 F.Supp. 849, 855 (D.Conn. 1977); Wright & Miller, Federal Practice and Procedure § 1381, at 802 (1969). The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where, as here, the factual background for a case is largely undeveloped. *See id.* at 800-02.

Mindful of both of these principles, we deem it appropriate to reverse the order of the district court and remand the case for further development of the claims and theories of the parties. The district court will then be in a position to make informed and definitive rulings on which claims then in contention are preempted.

III.

For the foregoing reasons, we will reverse the order of the district court to the extent that it granted the Cipollones' motion to strike appellants' preemption defenses. We will also remand the case for further proceedings consistent with this opinion.

APPENDIX E—OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Rose CIPOLLONE and Antonio Cipollone,

Plaintiffs,

v.

LIGGETT GROUP, INC., Philip Morris Incorporated, and Loew's Theatres, Inc.,

Defendants.

Civ. A. No. 83-2864.

United States District Court,
D. New Jersey.

Sept. 20, 1984.

OPINION

SAROKIN, District Judge.

INTRODUCTION

Despite the growing evidence that cigarette smoking is indeed hazardous to one's health, as recognized in the warning mandated by Congress, a legislative decision has been reached not to prohibit it. Although that decision may be due in some measure to the ongoing medical dispute as to the risks involved, it is predicated to a large extent on economic considerations and the apparent willingness of millions of persons to continue smoking despite the known and unknown risks. Congress, in order to avoid another

Prohibition, has decided to permit the manufacture and sale of cigarettes to continue, but has attempted to assuage its critics by regulating the industry and requiring it to affix a warning to each package sold.

The legislative history of the Act here involved reflects a candid concern for the economy of the entire country if cigarette manufacturing were curtailed or eliminated. One would hope that those fiscal considerations were weighed against the costs of illness and death caused by cigarette smoking as well as the moral responsibility of protecting the young and future generations who have not yet begun to smoke.

In any event, that branch of the government which is charged with the responsibility of protecting the health and welfare of our society has determined that the cigarette industry shall be permitted to flourish after consideration of the consequences of permitting it to do so. This case presents the issue of whether cigarette manufacturers can be subjected to tort liability, if they have complied with the federal warning requirement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." In effect, the cigarette industry argues that compliance immunizes it from liability to anyone who has chosen to smoke cigarettes notwithstanding the warning, that the federal legislation has created an irrebutable presumption that the risk of injury has been assumed by the consumer. This court rejects that contention.

The clear purpose of the federal legislation was to establish a uniform warning which would prevail throughout the country. By so doing, cigarette manufacturers would not be subjected to varying requirements from state to state. However, the existence of the present federally mandated warning does not prevent an

individual from claiming that the risks of smoking are greater than the warning indicates, and that therefore such warning is inadequate. The court recognizes that it will be extremely difficult for a plaintiff to prove that the present warning is inadequate to inform of the dangers, whatever they may be. However, the difficulty of proof cannot preclude the opportunity to be heard, and affording that opportunity will not undermine the purposes of the Act.

Defendants' argument that the statute was intended to foreclose such claims is not borne out by either the language or legislative history of the Act. Simply stated, defendants contend that a cigarette manufacturer who utilizes the federal warning cannot be held liable in tort. Just as simply, that statement could have been incorporated into the statute, if that were the intention, but it was not. Before this court or any other court so cavalierly rejects fundamental principles of the common law, it should demand a much more definitive statement from Congress.

The information regarding disease from smoking is growing. Medical and scientific opinion is divided. The impact on the economy is a factor considered by Congress and may well have caused a compromise in the content of the warning. Even Congress, which once declared that cigarette smoking *"may be"* hazardous, now finds that it *"is"* hazardous. This court believes that an individual injured while the warning was that cigarette smoking "*may be* hazardous to your health" would have been able to prevail if he or she was able to prove that "cigarette smoking is [was] hazardous to your health." Today even some greater warning may be appropriate, and variations are now being considered. In any event, no one should be deprived by virtue of congressional compromise of the opportunity of proving that contention absent a clear showing that Congress intended that they be so precluded.

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There are further claims asserted by plaintiff which likewise deserve their day in court. Thus, even if utilizing the federal warning relieves cigarette manufacturers of liability for failure to warn, the question remains whether they can be held liable for collateral efforts to neutralize or negate the effects of the warning. Efforts to convince the public that the risks do not exist or that they are minimal or unsupported by medical or scientific data may in and of themselves give rise to a cause of action; indeed they may even constitute a violation of the very statute which defendants brandish as a shield. Whether the present federally mandated warning is adequate and whether defendants have wrongfully attempted to neutralize that warning are thus issues which survive the federal statute and are not preempted by it.

Certainly, as in all such cases, the federal standard is strong evidence of the adequacy of the warning, but it is not conclusive. The federal government regulates many industries, not least of which is the ethical drug industry. The fact that the safety, efficacy, literature and warnings pertaining to drugs are reviewed and approved by the government pursuant to the authority of Congress has never relieved drug manufacturers of liability in tort if the risks exceeded the warnings given. These cases, among others, recognize that even the federal government is fallible. The fact that it finds a product safe or a warning adequate does not necessarily make it so. The private citizen should not be deprived of the opportunity to establish such fallibility and vindicate his or her rights to recover for injuries sustained if supported by competent proofs.

THE COMPLAINT

Plaintiff Rose Cipollone is dying of lung cancer. She brings this products liability action against three cigarette companies,

alleging that they are responsible for her current state. Her fourteen-count complaint sounds in strict liability (Counts 2, 3 and 9), negligence (Counts 4 and 5), intentional tort (Counts 6 and 8) and breach of warranty (Count 7). She claims that defendants have produced an unsafe and defective product (Counts 2 and 7), the risk of which outweighs its utility (Count 2), but have negligently (Count 4) or intentionally (Count 8) failed adequately to warn consumers of the hazards associated with cigarette smoking. *See also* Count 3 (strict liability for failure to warn). Indeed, she contends, defendants have negligently (Count 5) or intentionally (Count 6) advertised their products so as to neutralize and render ineffective those warnings actually given, warnings which are made meaningless in any event by the addicitive qualities of cigarettes (Count 9).[1]

Defendants have each answered, asserting as an affirmative defense, *inter alia,* that plaintiff's claims are preempted by the Federal Cigarette Labeling Act, as amended by the Public Health Cigarette Smoking Act, 15 U.S.C. § 1331 *et seq.* Plaintiff has moved to strike such defense. With the cross-motion of defendant Loew's Theatres, Inc. for judgment on the pleadings, the parties are now before the court on this difficult issue.

The Act

The Federal Cigarette Labeling and Advertising Act

Originally enacted in 1965, the Federal Cigarette Labeling and Advertising Act ("the Act") followed a report of the Surgeon

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1. Counts 10 through 13 contain allegations concerning the identities of various defendants. Count 14 comprises plaintiff Antonio Cipollone's claim for "loss of comfort, companionship and consortium. . ."

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General of the United States concluding that cigarette smoking comprised a significant health hazard to Americans, warranting remedial action by Congress. As amended in 1970, the Act sets forth the following statement of policy:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331. In order to effectuate these purposes, Congress provided that

> It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Such statement shall be located in a

> conspicuous place on every cigarette package, and shall appear in conspicuous and legible type in contrast by typograph, layout, or color with other printed matter on the package.

15 U.S.C. § 1333. The Federal Trade Commission was given the authority to regulate cigarette advertising, 15 U.S.C. §§ 1335-36, and the district courts jurisdiction to enjoin violations of the Act. 15 U.S.C. § 1339. A minimal criminal penalty was also provided. 15 U.S.C. § 1338.

Congress included within the Act a provision regarding preemption, and it is this provision which is now before the court for interpretation and application. Congress stated:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labelled in conformity with the provisions of this chapter.

15 U.S.C. § 1334. Plaintiff concedes that this section prohibits states from regulating cigarette packaging, and cigarette advertising by, for example, requiring a warning other than that set forth in the Act. She argues, however, that this provision does not preempt state common law claims such as those asserted by plaintiff.

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Preemption

"The Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. From this simple mandate springs the doctrine of preemption, as first stated by Chief Justice Marshall in *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824):

> The nullity of any act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every case, the act of Congress, or the treaty, is supreme; and the law of the state though enacted in the exercise of powers not controverted, must yield to it.

22 U.S. at 210-11. *See also Fidelity Federal Savings & Loan Ass'n. v. De La Cuesta,* 458 U.S. 141, 152, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (preemption doctrine has its roots in the Supremacy Clause of the Constitution).

From *Gibbons v. Ogden* on, courts, have struggled with the

question of whether federal law preempts state action. The problem is "largely one of statutory construction," and therefore "cannot be reduced to general formulas." L. Tribe, *American Constitutional Law* at 377 (1978). However, certain principles are clear. First, federal law may *expressly* preempt state law. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission,* 461 U.S. 190, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983), citing *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Absent express preemption, federal law may nonetheless have an implied preemptive effect if Congres so intended, and indicated such intent by "occupying the field" in a particular area. Thus

> Congress' intent to supercede state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the objects sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."

Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, supra, 458 U.S. at 153, 102 S.Ct. at 3022; *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); *cited in Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, supra,* 103 S.Ct. at 1722. And, even if Congress has not entirely displaced state regulation over the matter in question, state law may nonetheless be preempted to the extent that it actually conflicts

with the federal law. Such conflict occurs where "compliance with both federal and state regulations is a physical possibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). *See generally Silkwood v. Kerr-McGee Corp.,* ____ U.S. ____, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984); *Pacific Gas & Electric Co., supra,* 103 S.Ct. at 1722; *Fidelity Federal Saving & Loan Ass'n, supra,* 458 U.S. at 153, 102 S.Ct. at 3022. Together, these principles seek to accommodate the competing interests engendered by appropriate national regulation and the legitimate exercise of state power. Underlying any discussion of preemption, therefore, is the structural foundation of a federal system, in which state and federal regulation must co-exist. The preservation of that system requires a presumption "that Congress did not intend to displace state law", *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981), quoting *Rice v. Sante Fe Elevator Corp., supra,* 331 U.S. at 230, 67 S.Ct. at 1152; "preemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 634, 101 S.Ct. 2946, 2962, 69 L.Ed.2d 884 (1981), quoting *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981); *Florida Lime & Avocado Growers, supra,* 373 U.S. at 142, 83 S.Ct. at 1217. Moreover, state law should be suspended "only to the extent of actual conflict with the scheme of federal regulation." *In re Quanta Resources Corp.,* 739 F.2d 912 at 915 (3d Cir. 1984), citing *Stellwagen v. Clum,* 245 U.S. 605, 613, 38 S.Ct. 215, 217, 62 L.Ed. 507 (1918).

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Here, the preemption issues arises in the context of a claim that the Federal Cigarette Labeling Act preempts the state common law claims asserted by plaintiff. There is no question, as defendants argue, that common law is as susceptible of preemption as are state statutes or regulations for, as the Supreme Court has stated,

> regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959).[2] *See also Sperry v. Florida,* 373 U.S. 379, 403, 83 S.Ct. 1322, 1335, 10 L.Ed.2d 428 (1963) ("The authority of Congress is no less when the state power it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature.") Hence, courts have held that federal statutes have preempted state common law claims in many areas. *See e.g., Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 582-84, 101 S.Ct. 2925, 2932-33, 69 L.Ed.2d 856 (1981) (Natural Gas Act preempts calculation of damages under state common law of contract); *Kalo Brick, supra,* 450 U.S.

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2. It should be noted that the *Garmon* case did not involve the preemption of state common law claims, since the state courts had relied on various state statutory provisions in reaching the applicable decisions. 359 U.S. at 239, 79 S.Ct. at 776.

at 317-32, 101 S.Ct. at 1130-37 (Interstate Commerce Act regulation of abandonment of service preempts state tort claim); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin,* 418 U.S. 264, 270-73, 94 S.Ct. 2770, 2774-75, 41 L.Ed.2d 745 (1974) (NLRA preempts certain state libel claims); *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225, 229-33, 84 S.Ct. 784, 787-89, 11 L.Ed.2d 661 (1964) (federal patent and copyright laws preempt state actions for unfair competition, at least in part); *Hodges v. Atchison, Topeka & Santa Fe Railway Co.,* 728 F.2d 414, 416-17 (10th Cir. 1984) (Railway Labor Act preempts state common law claim for wrongful discharge); *Harper & Row Publishers, Inc. v. Nation Enterprises,* 723 F.2d 195, 199-201 (2d Cir. 1983) (Copyright Act preempts state common law claims for conversion and interference with contract); *Howard v. Uniroyal, Inc.,* 719 F.2d 1552 (11th Cir. 1983) (Rehabilitation Act of 1973 preempts state contract claim); *Viestenz v. Fleming Companies, Inc.,* 681 F.2d 699, 701-04 (10th Cir.), *cert. denied,* 459 U.S. 972, 103 S.Ct. 303, 74 L.Ed.2d 284 (1982) (National Labor Relations Act preempts state actions for wrongful discharge and intentional infliction of emotional distress arising out of labor context); *Hasbrouck v. Sheet Metal Workers Local 232,* 586 F.2d 691, 694 (9th Cir. 1978) (National Labor Relations Act preempts state claims of defamation and business disparagement); *City of Chicago v. General Motors Corp.,* 467 F.2d 1262, 1265 (7th Cir. 1972 (National Emissions Standard Act preempts state products liability based upon automobile pollution); *Zittrouer v. Uarco Inc. Group Benefit Plan,* 582 F.Supp. 1471, 1477 (N.D. Ga. 1984) (ERISA preempts state tort claim for bad faith handling of benefits claim); *Delisi v. United Parcel Service, Inc.,* 580 F.Supp. 1572 (ERISA and NLRA preempt state common law claim for wrongful discharge); *Salcedo v. Norfolk & Western Railway Co.,* 572 F.Supp. 286, 288 (E.D. Mich. 1982) (Railway Labor Act preempts state law claims for emotional distress and intentional interference

with contractual relations); *Videotronics, Inc. v. Bend Electronics,* 564 F.Supp. 1471, 1476-77 (D.Nev. 1983) (Copyright Act preempts state common law claims of misappropriation and trade secret violations); *Shaw v. International Ass'n of Machinists & Aerospace Workers Pension Fund,* 563 F.Supp. 653, 658-59 (C.D. Calif. 1983) (ERISA preempts certain state common law claims for breach of contract), citing *Lafferty v. Solar Turbines International,* 666 F.2d 408 (9th Cir. 1982); *Huth v. B.P. Oil, Inc.,* 555 F.Supp. 191, 194 (D.Md. 1983) (Petroleum Marketing Practices Act preempts conflicting state common law claims), citing, *e.g., Meyer v. Amerada Hess Corp.,* 541 F.Supp. 321, 332 (D.N.J. 1982) (same); *State of North Dakota v. Merchants National Bank and Trust Co.,* 466 F.Supp. 953 (D.N.D. 1979) (federal banking law preempts state common law of unfair competition). *See also City of Milwaukee v. Illinois,* 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) (federal statute preempts federal common law). However, there remains a presumption against the preemption of state common law, in particular, since such law is often the result of many generations of judicial development, *see, e.g., Iconco v. Jensen Construction Co.,* 622 F.2d 1291, 1296 (8th Cir. 1980), and, more importantly, concerns areas "traditionally regarded as within the scope of state superintendence." *Florida Avocado Growers v. Paul, supra,* 373 U.S. at 144, 83 S.Ct. at 1218. *See also Pacific Gas & Electric Co., supra,* 103 S.Ct. at 1723, quoting *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230, 67 S.Ct. at 1152 ("Congress legislated here in a field which the States have traditionally occupied . . . so we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); *Milwaukee v. Illinois, supra,* 451 U.S. at 316-17, 101 S.Ct. at 1792, citing *Jones v. Rath Packing Co.,* 430 U.S. at 525, 97 S.Ct. at 1309. *See generally* Tribe, *supra,* § 6-25 at 385-86. Torts, such as those alleged here, are precisely

the sort of legal action that falls within the scope of a state's historical and prototypical powers. *See, e.g., Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1542 (D.C. Cir. 1984); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 462, 479 A.2d 374 (Sup.Ct. of N.J. 1984).[3] The presumption against preemption of these causes of action is strengthened where preemption would leave a putative plaintiff without adequate remedy for violation of his or her state created rights. *See Silkwood v. Kerr-McGee Corp., supra,* 104 S.Ct. at 626. *See also id.* at 629 ("it is inconceivable that Congress

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3. The cases involving labor law are instructive on this point. Generally, labor relations are a federal concern and, state laws conflicting with the NLRA are preempted. *See, e.g., San Diego Building Trades Council v. Garmon, supra,* 359 U.S. at 239-45, 79 S.Ct. at 776-79. However, the Supreme Court has carefully tailored the resulting preemption doctrine to take cognizance of the activities in which states have a "compelling . . .interest," *id.* at 247, 79 S.Ct. at 781, or which concern matters "so deeply rooted in local feeling or responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.* at 244, 79 S.Ct. at 779. Hence, for example, the Court has carved out exceptions to the general preemption doctrine for "conduct marked by violence and imminent threats to the public order," *id.* at 247, 79 S.Ct. at 781 (citing cases) for certain defamation actions, *Old Dominion Branch No. 496, National Ass'n of Letter Carriers, supra,* 418 U.S. at 271-73, 94 S.Ct. 2770 at 2774-75, 41 L.Ed.2d 745, citing *Linn v. Plant Guard Workers,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (allowing state defamation actions to the extent that published statements are made with knowledge of their falsity or reckless disregard for the truth), for actions for intentional infliction of emotion distress, *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), and for trespass actions. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). In each of these cases, the Court found the conduct addressed by state law to be beyond the scope of the NLRA, and thus of only peripheral concern to federal purposes, to be of a deeply felt concern of the states, and to pose little risk of state interference with the Act. *See e.g., Farmer, supra,* 430 U.S. at 298, 97 S.Ct. at 1062.

intended to leave victims with no remedy at all" (Blackmun, J., dissenting). However, any application of these principles inevitably requires the interpretation of a statute. *See* Note, *Preemption as a Preferential Ground: A New Canon of Construction,* 12 Stanf.L.Rev. 208, 208-210 (1959). It is to such interpretation that the court now turns.

DISCUSSION

A. Express Preemption

The court first addresses the question of whether the common law causes of action here asserted by plaintiff are expressly preempted by the Act. Congress has preempted certain state action by the terms of 15 U.S.C. § 1334, which is entitled "Preemption," and does not allow any "statement relating to smoking and health, other than the statement required by Section 1333 . . ." to be "*required* on any cigarette package." 15 U.S.C. § 1334(a) (emphasis added). It likewise does not permit any "*requirement or prohibition* based on smoking or health" to be "imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (emphasis added). Indeed, plaintiff concedes that the Act "precludes state and government *regulation* of labeling and advertising." Plaintiff's Brief (2/24/84) at 4. *See also Id.* at 8, 18, 29. Nonetheless she argues that her claims, should they succeed, will not constitute regulation of cigarette labeling or advertising, but merely compensation for the harmful effects of smoking and thus, that they are not preempted. In support of this argument is the language of the statute, which does not, in so many words, prohibit suits against cigarette companies based upon state common law. Plaintiff argues, and the court agrees, that had Congress wished

to extinguish state causes of action, it could easily have done so.

Defendants contend that, as state tort law has a clear regulatory effect, it falls within the language of § 1334, and indeed might well act so as to undermine the Act's purposes of creating uniformity of effective cigarette labeling and advertising, and of assuring the continued viability of the tobacco industry. Like plaintiff, defendants argue based upon what does not appear in the Act, stating that had Congress wished to allow state common law causes of action to survive, it would have included a savings clause. Indeed, defendants complement their superb briefing with a thorough Appendix, including examples of fifty such clauses appearing in federal acts.

The court, however, is persuaded that, on its face, the Act does not explicitly preempt state common law claims, and that determination of the question of whether preemption was intended requires an analysis of the legislative history of the Act. It is true, as defendants argue, that Congress could have included a savings clause within the Act, as it did, for example, in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4). It did not. Nor, however, did Congress explicitly include state common law within the Act's preemption provision, as it did, for example, in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(c)(1).[4] The question is thus not one that can be

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4. ERISA's preemption clause states that

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title. . .

(Cont'd)

resolved through examining the expansiveness of the preemption

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(Cont'd)
29 U.S.C. § 1144(a). Later, it makes clear that

> For purposes of this section:
>
> (1) The term "State law" includes all laws, *decisions*, rules, regulations, or other State action having the effect of law, of any State. . .

29 U.S.C. § 1144(c)(1) (emphasis added). *See generally Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1214-16 (8th Cir.), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981). Similar provisions, specifically preempting state common law appear in other statutes as well, pertaining to both substantive, *see, e.g.*, 12 U.S.C. § 1715z-17(d), 1715z-18(c); 12 U.S.C. § 2259; 17 U.S.C. § 301(a); 25 U.S.C. §§ 1723(a)(1), 1753(d) (preemption of common law fraud claims only), and procedural provisions. *See, e.g.*, 5 U.S.C. §§ 7118(a)(6), 8124(b)(2); 22 U.S.C. § 4116(f); 33 U.S.C. § 923(a); 42 U.S.C. § 1988 (state common law procedures may be used in criminal cases to the extent consistent with the Constitution and laws of the United States). *See also* 25 U.S.C. § 1722(d) (defining "laws of the State" as including common law for purposes of the Maine Indian Claims Settlement Act of 1980). Hence, it is clear that, just as Congress could easily have provided a savings clause, so could it easily have explicitly preempted state common law. Indeed, in certain cases it did both. *See, e.g.*, 17 U.S.C. § 301; 25 U.S.C. § 1723(a)(1), 1753(d). Here, it did neither.

Moreover, to argue from the non-existence of a savings clause is not particularly persuasive, and flies in the face of the principle that "a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment." *Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966) (*en banc*), *cert. denied*, 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 (1967). *See also Checkrite Petroleum, Inc. v. Amoco Oil Co.*, 678 F.2d 5, 8 (2d Cir. 1982) (citing cases). Indeed, one scholar has pointed out that the proper negative inference in cases such as these is precisely the opposite of that which defendants seek to have the court draw: "Because statutes in derogation of the common law are disfavored, the maxim *[of expressio unius est exclusio alterius]* has been extensively employed to *avoid* repeal of the common law . . ." Sands, 2A *Sutherland Statutory Construction* § 47.24, at 128 (1973) (emphasis added).

provision of the Act, on its face.[5]

Nor does the court find it sufficiently clear that state tort law is encompassed within the terms "requirement or prohibition" utilized in § 1334 to be *expressly* preempted by the Act. Whether or not the effect of such New Jersey tort law is a conflict with the Act rendering such state law *impliedly* preempted, a matter discussed in some detail, *infra* at 1166-1170, the court cannot find the terms "requirement or prohibition" expressly to abolish common law remedies such as those sought by plaintiff. It is true

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5. Indeed, even where savings clauses appear, they have often been narrowly construed so as to effectuate the purposes of a particular congressional enactment. *See, e.g., People of the State of Illinois v. City of Milwaukee,* 731 F.2d 403, 413-14 (7th Cir. 1984) (narrowly construing savings clause in Federal Water Pollution Control Act); *American Progressive Life and Health Insurance Co. of New York v. Corcoran,* 715 F.2d 784, 786-87 (2d Cir. 1983) (narrowly construing savings clause regarding insurance in ERISA); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 (9th Cir. 1979) (narrowly construing savings clause in Mineral Lands Leasing Act); *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1274-81 (5th Cir. 1978) (narrowly construing jurisdictional savings clause in Securities Exchange Act of 1934); *National Ass'n of Regulatory Utilities Commissioners of Coleman,* 542 F.2d 11, 13-15 (3d Cir. 1976) (narrowly construing savings clause in Federal Railroad Safety Act). *See also Head v. New Mexico Board of Examiners,* 374 U.S. 424, 444, 83 S.Ct. 1759, 1770, 10 L.Ed.2d 983 (1963) (Brennan, J., concurring) (a general savings clause "does not resolve specific problems. . .but its inclusion in the statute plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable"), *cited in Lockheed Air Terminal, Inc. v. City of Burbank,* 457 F.2d 667, 675 (9th Cir. 1972) (finding of preemption "unavoidable" under Federal Aviation Act), *aff'd,* 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). *See generally, Note, supra,* 12 Stanf.L.Rev. at 211-15 (courts have paid "slight attention" to savings clauses); *Sands, supra,* § 47.24 at 128 (where "the policy and purpose of the statute indicate that the common law was intended to be superseded, and the wording of the statute is so complete that it reasonably appears to be exclusive" statute may preempt the common law).

that, as a secondary effect, tort actions may have some regulatory effect; this occurs because the primary and unquestionable effect of a finding of tort liability is to shift the "burden of losses" to "those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur." *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 379, 161 A.2d 69 (1960). Indeed, compensation is the very purpose of tort liability in this state and elsewhere. *See, e.g., O'Brien v. Muskin Corp.*, 94 N.J. 169, 179, 463 A.2d 298 (1983); *Michalko v. Cooke Color & Chemical Corp.*, 91 N.J. 386, 398, 401 A.2d 179 (1982); *Beshada v. Johns-Manville Product Corp.*, 90 N.J. 191, 205-06, 209, 447 A.2d 539 (1982); *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 173, 406 A.2d 140 (1979) ("Strict liability . . . is but an attempt to minimize the costs of accidents and to consider who should bear those costs."); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 65, 207 A.2d 305 (1965) (purpose of tort liability "is to insure that the cost of injuries or damage . . . resulting from defective products . . .is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.") *See also Cinnaminson Township Board of Education v. U.S. Gypsum Co.*, 552 F.Supp. 855, 857 (D.N.J. 1982), quoting *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 350, 431 A.2d 811 (1981) (". . . this court has long recognized the significance of the social policy of risk-spreading in establishing the manufacturer's duty to the product user under the rapidly expanding principles of strict liability in tort.") *See generally Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 701, 377 P.2d 897 (1962) (citing authorities); Prosser and Keeton, *The Law of Torts* § 1 at 5, § 4 at 20 (1984); Harper and James, *The Law of Torts* § 13.2 at 762-63 (1965). As defendants correctly contend, the imposition of tort liability may as a consequence, have a regulatory impact. Indeed, one purpose

of products liability law is "to motivate individuals in the context of commercial enterprise to invest in safety." *Michalko, supra,* 91 N.J. at 398, 401 n. 4, 451 A.2d 179; *Beshada, supra,* 90 N.J. at 206-07, 447 A.2d 539. *See also* Prosser and Keeton, *supra,* § 4 at 25-26. Whether that regulatory impact conflicts with the purposes of the Act is a matter of implied preemption, and will be discussed later. Whether such impact comprises regulation, that is, creates a "requirement or prohibition," raises the question of express preemption.

The court finds that it does not. Regulation implies that certain behavior be absolutely required or prohibited: thus, one may not run a red light, or under the Act, fail to produce a cigarette package without the warning required by § 1333, without risking criminal liability or injunctive sanctions. Such behavior is prohibited and, in that sense, regulated. Similarly, were the New Jersey Legislature to mandate that a different warning be placed on cigarette packages, it would be imposing a requirement and, in that sense, regulating; such statute would, of course, be expressly preempted by the Act. Tort liability, however, merely "motivates" a person or business entity to act or refrain from acting by creating certain financial incentives; failing to do so, however, may or may not subject one to recurrent tort liability, and cannot subject one to an injunction or to criminal penalties in the common law context.[6] Hence, the producer of a defective produce, who has

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6. The federal courts have long held that there is no federal common law of crimes, *see, e.g., United States v. Best,* 573 F.2d 1095, 1101 (9th Cir. 1978), citing *Morissette v. United States,* 342 U.S. 246, 263, 72 S.Ct. 240, 249, 96 L.Ed. 288 (1952); *United States v. Coolidge,* 14 U.S. (1 Wheat.), 415, 4 L.Ed. 124 (1816); *United States v. Hudson,* 11 U.S. (7 Cranch) 32, 3 L.Ed. 259 (1812). *See also United States v. Berrigan,* 482 F.2d 171, 185 (3d Cir. 1973); *Levy v. Parker,* 478 F.2d 772, 796 and n. 35 (3d Cir. 1973), *rev'd on other grounds,* (Cont'd)

been found liable in tort is put to a choice: it may avoid the risk of future liability by remedying the defect in its product or, at the extreme, by withdrawing such product from the market, or it may confront such risk, hoping that future juries, acting in light of different sets of facts, will find for it. Which course it takes depends upon a complex combination of economics, morality and psychology. In this sense, tort liability does not regulate at all; it merely creates some probability of changing the behavior of those upon whom it imposes liability, and without dictating the form of such change. *See generally Ferebee v. Chevron Chemical Co., supra,* 636 F.2d at 1541. What that probability is, and the form such behavioral change would take, provides a starting point for an analysis of whether a conflict exists between the imposition of state tort liability and federal legislation, here, the Act. However, the differences between regulation and motivation are such as to preclude a finding of express preemption. As the one scholar who has explored this particular question has written

> Courts adjudicate prior misconduct and require payment for injury. When a court imposes liability for failure to adequately warn, no specific "statement relating to smoking and health" is being required. The practical effect of this may be that cigarette companies will choose to add an addiction warning so as to avoid future liability. A damages award, however, requires only payment

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417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), and New Jersey agrees. N.J.S.A. 2C:1-5(a) ("Common law crimes are abolished and no conduct constitutes an offense unless the offense is defined by this code or another statute of this state.")

> —it is not an injunction requiring the defendant to incorporate into its advertising a fixed legend different from the federally required label. The labeling acts do not prohibit a manufacturer from warning of undisclosed health risks. The only prohibition is against a state agency passing a law requiring cigarette companies to use a different label.

D. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal,* 53 S.Cal.L.Rev. 1423, 1454 (1980) (footnote omitted).

The question of express preemption and the legal issues raised thereby ought not, under the principles enunciated *supra,* at 8-16, be resolved so as to displace traditional state common law remedies unless Congress' expression of its desire to do so is crystal clear. Congress' words reveal far less clarity: it did not expressly preempt the common law claims asserted here.[7]

B. Implied Preemption

As discussed earlier, the fact that plaintiff's common law claims are not expressly *preempted* does not end this inquiry.

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7. It should be noted that this section addresses only plaintiff's claims regarding failure to warn, Counts 3, 4 and 8, and deceptive advertising, Counts 5, 6 and 9. It does not address plaintiff's risk-utility allegation, contained in Count 2 and, to an extent, Count 7, of the complaint, because defendants do not contend that such claim is expressly preempted, but only that it is impliedly preempted as a result of conflict with the Act, Brief of Defendant Loew's Theatres, Inc. at 31-32, or because the Act has occupied the field. *Id.* at 32-33. Nor could defendants argue that this sort of claim has been expressly preempted, for language of the Act addresses only cigarette package labelling, on the one hand, 15 U.S.C. § 1334(a), and advertising or promotion, on the other. 15 U.S.C. § 1334(b).

Rather, such claims may be *impliedly* preempted if Congress so intended, and manifested such intent either by "occupying the field," or if plaintiff's claims implicate state law which "actually conflicts" with the Act. The question of implied preemption necessarily requires a careful examination of the legislative history of the Act.

Defendants rest their implied preemption arguments on three aspects of the legislative history of the Act. First, they state that Congress made it absolutely clear that the Act was not meant as a prohibition of cigarette manufacture, sale or use. Citing the legislative history, defendants point to congressional concern with the moral and economic effects of such a prohibition, as well as to evidence that cigarette smoking actually enhances psychological and social well-being. Second, defendants point to Congress' desire to enact a uniform national policy with respect to the relationship between smoking and health, in part in order to protect the aforestated values. And third, at oral argument, defendants contended that Congress intended that only the statement prescribed in § 1333 appear on cigarette packages; thus, they argue, no court may impose a greater duty to warn and, indeed, no cigarette company may voluntarily utilize a different warning.

Plaintiff counters that the legislative history assumes the continued existence of common law tort actions against cigarette companies, particularly in the area of products liability. Specific passages indicate debate over the effect of the warning mandated upon the defense of assumption of the risk but, plaintiff argues, thus indicate an acceptance of the existence of the common law suits in which such defense would be pled. Moreover, plaintiff contends, Congress could not have intended, and did not intend, to deprive prospective plaintiffs of the remedy at law here sought.

Appendix E

The parties support their contentions with persuasive statutory authority and legislative history. Hence, defendants rely upon the debate surrounding passage of the Act, noting that, despite the call-to-action that ensued upon issuance of the Surgeon General's January 11, 1964 report entitled "Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Services," Congress chose a moderate course. Fearing the intrusion on "our personal rights and liberties" of a prohibition of cigarettes, *Cigarette Labeling and Advertising: Hearings on H.R. 2248, 3014, 4007, and 4249 Before the House Committee on Interstate and Foreign Commerce,* 89th Cong., 1st Sess. 225 (1965) (statement of Emerson Foote, Chairman, National Interagency Council on Smoking and Health), Congress rejected the notion of, for example, an outright ban on manufacture and sale. *See also Hearings on H.R. 2248, supra,* at 24 (statement of Congressman Morris K. Udall ("The Constitution guarantees us all these great freedoms including the freedom to abuse our health and make fools of ourselves if we want to, and I do not intend to deprive people of these great freedoms."); *Hearings on H.R. 643, 1237, 3055, 6543 Before the House Committee on Interstate and Foreign Commerce,* 91st Cong., 1st Sess., 348 (1969) (statement of Dr. Sol R. Baker, Chairman, Committee on Tobacco and Cancer, American Cancer Society) (". . . we are against prohibition. Some of us lived through one era of prohibition, and we certainly would not like to see another. We feel that it is the individual's right to smoke if he decides to . . ."); H.Rep. No. 449, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S. Code Cong. & Adm. News 2350, 2352 (". . . the Committee believes that the individual must be safeguarded in his freedom of choice—that he has the right to choose to smoke or not to smoke . . ."). Indeed, it is even true that, in opting for a response to the Surgeon General's conclusion that "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant

appropriate remedial action," Congress heard testimony of the "significant beneficial effects of smoking primarily in the area of mental health." *Hearings on H.R. 2248, supra,* at 167, (statement of Rep. Horace R. Kornegay) quoting the Surgeon General's 1964 Report at 356. *See also id.* at 438-39 (statement of Fred S. Royster, Managing Director, Bright Belt Warehouse Association) ("There seems to be no doubt but that the use of tobacco in its various forms is relaxing, is enjoyable, and is conducive of a measure of contentment. . . It is possible that the relaxation and contentment and enjoyment produced by smoking has lengthened many lives."); *Hearings on H.R. 643, supra,* at 551 (statement of Joseph F. Cullman, III, Chairman of the Executive Committee, The Tobacco Institute); *id.* at 1008-09 (statement of Dr. Charles Hine, Clinical Professor of Pharmacology and Preventive Medicine, Univ. of California).[8] Most importantly, perhaps, Congress' choice of labeling as the appropriate response to the Surgeon General's conclusion that '[c]igarette smoking is associated with a 70-percent increase in the age-specific death rates of males" due to lung cancer, chronic bronchitis and emphysema, and cardiovascular diseases, *see* S.Rep.

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8. These considerations did not, however, appear in the Senate or House reports, or the Conference report in either 1965 or 1969. *See* S.Rep. No. 195, 89th Cong., 1st Sess. (1965); H.Rep. No. 449, 89th Cong., 1st Sess. (1965); H.Rep. No. 586, 89th Cong., 1st Sess. (1965) (Conference Report), U.S. Code Cong. & Admin. News 1965, p. 2350; S.Rep. No. 91-566, 91st Cong., 1st Sess. (1969); H.Rep. No. 91-289 91st Cong., 1st Sess. (1969); H.Rep. No. 91-897 91st Cong., 2nd Sess. (1970) (Conference Report), U.S. Code Cong. & Admin. News 1970, p. 2652. It is therefore not clear that these "beneficial effects" were actually considered by Congress. *See generally* Sands, *supra,* § 48.10 at 209 ("Although statements in the committee report as to the reason for or the nature and effect of the proposed law are freely used by the courts to determine the intent of the legislature, they have been more hesitant in resorting to similar statements made by committee members or other persons at the committee's hearings.")

No. 195, 89th Cong., 1st Sess. 2-3 (1965), quoting the Surgeon General's 1964 Report, was the result of economic considerations. Indeed, the Act, in its preamble, seeks explicitly to protect "commerce and the national economy . . . to the maximum extent consistent with this declared policy . . ." 15 U.S.C. § 1331(2)(A). Thus, in 1965, Congress heard repeatedly of the economic ramifications of its proposed actions on the tobacco industry, "clearly a vital sector in this country's economy." *Hearings on S. 559 and S. 547 Before the Senate Committee on Commerce,* 89th Cong., 1st Sess. 246 (1965) (statement of Bowman Gray, Chairman of the Board, R.J. Reynolds Tobacco Co.). *See also id.* at 396-97 (statement of Sen. Sam J. Ervin, Jr.); *id.* at 543-45 (statement of Fred S. Royster, Managing Director, Bright Belt Warehouse Association); *id.* at 638-39 (statement of Ziggy Lane, Field Coordinator, National Association of Tobacco Distributors); 111 Cong. Rec. 13897-98 (June 16, 1965) (statement of Sen. Bass); 111 Cong.Rec. 13914-15 (June 16, 1965) (statement of Sen. Ervin). For example, Congress heard that, at that time, cigarettes were smoked by over 70 million people, spending over $8 billion, of which $3.3 billion went to excise taxes, supporting 750,000 farm families, as well as 96,000 persons in manufacturing. In all, tobacco was American's fifth largest cash crop, and accounted for $405 million in exports. These statistics had become more impressive by 1969, when Congress again took up the issue, ultimately resolving to strengthen the Surgeon General's warning. *Hearings on H.R. 643, supra,* at 25-26 (statement of Rep. John L. McMillan), 42-43 (statement of Reps. Richardson Preyer and Wilmer D. Mizell), 61-63 (statement of Rep. W.M. Abbitt), 64 (statement of Rep. William H. Natcher), 604-05 (statement of Robert W. Scott, Governor of North Carolina); 115 Cong.Rec. 16189-91 (June 17, 1969) (statement of Rep. Edwards), 115 Cong.Rec. 16193-94 (June 17, 1969) (statement of Rep. Fountain); 115 Cong.Rec. 16294 (June 17, 1969) (statement of Rep. Abbitt).

In light of these facts, Congress chose to attack the health problems associated with cigarette smoking not by virtue of a tobacco prohibition, but through a labeling requirement, made stronger in 1969 so as to be more effective. *See* S.Rep. No. 91-566, *supra,* at 2664; H.Rep. No. 91-289, *supra,* at 5.

Defendants are thus correct that Congress did not intend, by passing the Act, to eradicate the tobacco industry and did not expect to abolish cigarette smoking. They are also correct that Congress viewed this goal as being furthered by the preemption provision of the statute, which would serve to eliminate "diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health," 15 U.S.C. § 1331(2)(B), and to establish "a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331. (Congressional declaration of policy and purpose). Indeed, the preemption provision of the Act, and the policy which underlies it, grew out of a concern that various states and localities would enact conflicting laws and ordinances.

> Some of the bills now pending before State legislatures would require a warning notice in cigarette advertisements appearing in periodicals published within the State. Others would require a health warning in cigarette commercials broadcast on a TV or radio station located within the State. The proposed form of the required caution notice varies from State to State.
>
> As a practical business matter, it would be almost impossible for any manufacturer to comply with

> all of these differing and conflicting State and local laws
>
> . . .
>
> If Congress does not extend [§ 1334], there will be piecemeal and conflicting Federal and State regulations in this field. There will be litigation. And there will be enormous confusion and uncertainty. These are precisely the considerations which prompted Congress in 1965 to preempt this matter.

Hearings on H.R. 643, supra, at 554 (statement of Joseph F. Cullman, III). Indeed, congressional action in 1965 was directed at avoiding the "maze of conflicting regulations" which would have resulted had Congress not acted in this area, 111 Cong.Rec. 13901 (June 16, 1965) (statement of Sen. Moss). *See* S.Rep. No. 195, *supra,* at 4; H.Rep. No. 449, *supra,* at 2352. And, in 1969, Congress looked back at what it had done and, apparently saw itself as having "fended off efforts by regulatory agencies, individual state governments, and local governments in some cases to invade its jurisdiction." *Hearings on H.R. 643, supra,* at 16 (statement of Rep. Carl D. Perkins). *See also* 115 Cong.Rec. 16299 (June 18, 1969) (statement of Rep. Preyer). Rejecting the argument that states, or their subdivisions, ought to be able to "alert their own citizens to the dangers of smoking," *Hearings on H.R. 643, supra,* at 288 (statement of John F. Banzhaf, III, Executive Trustee, Legislative Action on Smoking and Health), *see also* H.Rep. No. 91-289, *supra,* at 33 (minority views of Reps. Jarman, Dingell and Adams), Congress clarified and continued the preemption provisions then in effect. *See* S.Rep. No. 91-556, *supra,* reported in 1969 U.S.Code Cong. & Adm.News 2652, 2663; H.Rep. No. 91-289, *supra,* at 4, 7, 9. Both in 1965, and again

in 1969, Congress spoke of its actions in the language of preemption. Thus, for example, Senator Morton stated that "[t]he problem of smoking and health is national in scope. It is clearly one in which Congress should occupy the the field." 111 Cong.Rec. 13930 (June 16, 1965). Senator Magnuson, Chairman of the Senate Commerce Committee, apparently agreed

> I think that all of us, or at least speaking for myself, are in general agreement . . . that if this matter is to be attended to, that it should be on a Federal level rather than a local or State level.
>
> This is for very practical reasons, along with other reasons. If there is one product that is completely in interstate commerce it is tobacco.
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> It is grown in very few states and shipped all over to every State in the Union, every country in the world and, therefore, it would make it highly impractical and I think a burden on interstate commerce in this field should you have all kinds of regulations in various states.

Hearings on S. 559, supra, at 254. *See also id.* at 548. And, in 1969, Congressman Fountain argued:

> . . . all of us are mindful of the fact that there are certain areas in which the national interest is so paramount—where individual state laws might so jeopardize the national interest—that preemption is necessary; and in my opinion the problem here and the facts are so obvious—with every state and probably many municipalities

> passing different regulations requiring the manufacturers of cigarettes to have different labels on packages going into different states and areas—that the situation would become intolerable and so confusing and so frustrating to all concerned that the entire tobacco industry might be destroyed. For these reasons I believe in the doctrine of preemption in this case.

Hearings on H.R. 643, supra, at 30.

From these, and other, statements, defendants glean a congressional intent to preempt a field which includes the common law claims here asserted. They bolstered this assertion at oral argument by asserting that Congress intended that only the warning set forth in § 1333 be permitted to appear on cigarette packages; hence, a cigarette manufacturer found liable would not be permitted to escape such liability by altering its behavior, a result which, they claim, could not have been intended by Congress. In support of this position, defendants cite to congressional concern that the labeling requirement include a concise statement:

> Such cautionary statement should be short and direct, and should not be weakened in its impact by any qualifying adjectives such as "excessive," "continual," or "habitual." To this end, the committee had concluded that the following factual and succinct statement should now be prescribed: "Caution: Cigarette smoking may be hazardous to your health."

S.Rep. No. 195, *supra,* at 4. Consistent with such concern, the 1969 amendments to the Act changed the warning to: "Caution:

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The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." 15 U.S.C. § 1333. In so doing, and thereby lengthening the warning, Congress opted for a shorter warning than that proposed by the House, which had required a label stating "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health and May Cause Lung Cancer or Other Diseases," but longer and more equivocal than that proposed by the Senate, *i.e.*, "Warning: Cigarette Smoking Is Dangerous to Your Health." *See* H.Rep. No. 91-897, *supra,* at 5 (Conference Report). Defendants do not, however, point to any passages stating explicitly that cigarette manufacturers would violate the Act by including a statement in addition to that prescribed in § 1333. Nor is the language of the Act to that effect.

Plaintiff recognizes the arguments proffered by defendant, responding simply, that Congress not only did not explicitly preempt state common law claims, but assumed their continued existence. In support of this argument, plaintiff also quotes extensively from the legislative history. It is true, as plaintiff argues, that discussions of preemption are silent as to the common law; it is also true that they focus upon executive or legislative regulation. First, congressional concern regarding preemption have, as plaintiff indicates, consistently been voiced without mention of the common law, and not even in terms of regulation in general, but of "laws" or "regulations" implying particular executive or legislative enactments. *See, e.g., Hearings on S. 559, supra,* at 246, 548 (statement of Bowman Gray, Chairman of the Board of R.J. Reynolds Tobacco Co.) ("It would be intolerable if the states . . . were to remain free to pass conflicting laws or to impose conflicting regulations on this subject."); *Hearings on H.R. 643, supra,* at 30 (discussing "laws" and "regulations"); *id.* at 554 (same, discussing "bills pending before State

legislatures"); S.Rep. No. 195, *supra,* at 4 (discussion "a multiplicity of State and local regulations"); H.R.Rep. No. 449, *supra, cited in* 1965 U.S.Code Cong. & Adm.News, *supra,* at 2352 (same). Moreover, in arguing for the extension of the preemption provision in 1969, Representative Preyer of North Carolina addressed the amendment which that year altered such provision so that it no longer applied as previously to federal agencies. *See* 15 U.S.C. §§ 1335-36.

> . . . that amendment speaks only to a ban on cigarette advertising by the FCC. It does not cover any other Federal agency and, more importantly, it does not cover such a ban if adopted *by each states legislature or local governing body.*

115 Cong.Rec. 16299 (June 18, 1969) (emphasis added). *See also Hearings on H.R. 643, supra,* at 610 (statement of Rep. Satterfield) (discussing federal, state and local "administrative and executive agencies"). And, perhaps most significantly, Representative Udall, in criticizing the bill ultimately passed in 1965 as one that "should be entitled, 'A bill for the relief and protection of the tobacco industry,' " listed as separate problems with the bill—which he labeled Hookers No. 1 and No. 2—its preemptive effect on "state and local government," and the extent to which it "protects [the cigarette manufacturers] against lawsuits by cigarette users," by undermining the assumption of the risk defense. 111 Cong.Rec. 16546 (July 13, 1965). Were these problems linked, he would certainly have discussed them together; that he did not demonstrates the inapplicability of the preemption clause to common law actions. It thus appears that Congress, initially acting in fear of certain state legislative action, *see supra,* at 30, continued to contemplate regulation by legislative or administrative processes as the subject of the preemption provisions of § 1334. *See generally*

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Garner, *supra,* 53 S.Cal.L.Rev. at 1453-54.[9]

That common law claims were not intended for preemption is still clearer when viewed in terms of certain specifics of the congressional debate and, as defendants urge, within the historical context of that debate. *See* Brief of Defendant Loew's Theatres, Inc. at 12 (citing cases). Prior to passage and then amendment of the Act, products liability cases based upon state common law had, in fact, been brought against cigarette companies. *See, e.g., Green v. American Tobacco Co.,* 304 F.2d 70 (5th Cir. 1962),

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9. Defendants' arguments to the contrary are sparse. Defendant Liggett Group quotes Senate Report No. 91-566 as stating that the Act "prohibits health-related regulation or prohibition of cigarette advertising by any State or local authority." In reality, the 1969 Act clarified the previous preemption provision by making "it clear that the term 'State' includes any political division of any State." *Id.,* cited in 1970 U.S. Code Cong. & Admin. News 2652, 2663. And rather than stating the proposition cited in Liggett's brief, that Report actually states: "This preemption is intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivision of the State." *Ibid.* Thus limited to legislative and executive action, this statement provides potent support for plaintiff's position.

Defendants are thus left to rely upon the singular statement of Rep. Bolling: "This preempts the right of any entity, of any government, to decide for itself . . . ." 111 Cong. Rec. 16545 (July 13, 1965). In addition to the fact that this statement was immediately followed by remarks of Rep. Springer indicating the continued existence of common law suits, *see infra* at 38, remarks for which Rep. Bolling thanked Rep. Springer, the court notes that defendants should heed their own admonition: the remarks of a single legislator should "rarely . . . be taken as final." Brief of Defendant Loew's Theatres, Inc. at 21 n. 12, citing *Schiaffo v.Helstoski,* 492 F.2d 413, 428 (3d Cir. 1974). This is especially so where these remarks are uncharacteristic of congressional debate in general. *Ibid.* Here, Rep. Bolling may well have been making clear that which was clarified in 1969—that the preemption provision applied to "any government," including that of a locality.

question certified on rehearing, 154 So.2d 169 (Fla.), *rev'd and remanded,* 325 F.2d 673 (5th Cir. 1963), *rev'd and remanded on rehearing,* 391 F.2d 97 (5th Cir. 1968), *rev'd per curiam,* 409 F.2d 1166 (5th Cir. 1969) (*en banc*), *cert. denied,* 397 U.S. 911, 90 S.Ct. 912, 25 L.Ed.2d 93 (1970) (implied warranty of fitness for use under Florida law); *Ross v. Philip Morris & Co.,* 328 F.2d 3 (8th Cir. 1964) (implied warranty of fitness for use under Missouri law); *Lartigue v. R.J. Reynolds Tobacco Co.,* 317 F.2d 19 (5th Cir.), *cert. denied,* 375 U.S. 865, 84 S.Ct. 137, 11 L.Ed.2d 92 (1963) (implied warranty of fitness under Louisiana law), *cited in Hudson v. R.J. Reynolds Tobacco Co.,* 427 F.2d 541 (5th Cir. 1970); *Pritchard v. Liggett & Myers Tobacco Co.,* 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing,* 350 F.2d 479 (3d Cir. 1965), *cert. denied,* 382 U.S. 987, 86 S.Ct. 549, 15 L.Ed.2d 475 (1966), *modified,* 370 F.2d 95 (3d Cir. 1966), *cert. denied,* 386 U.S. 1009, 87 S.Ct. 1350, 18 L.Ed.2d 436 (1967) (warranty of fitness for use and negligent failure to warn, under Pennsylvania law); *Cooper v. R.J. Reynolds Tobacco Co.,* 234 F.2d 170 (1st Cir. 1956), *on remand,* 158 F.Supp. 22 (D.Mass. 1957), *aff'd,* 256 F.2d 464 (1st Cir. 1958) (fraud under Massachusetts law); *Albright v. R.J. Reynolds Tobacco Co.,* 350 F.Supp. 341 (W.D.Pa. 1972), *aff'd mem.,* 485 F.2d 678 (3d Cir. 1973), *cert. denied,* 416 U.S. 951, 94 S.Ct. 1961, 40 L.Ed.2d 301 (1974) (products liability action under Pennsylvania law).[10] And, although neither the statute itself

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10. *Albright* was filed on July 5, 1962. *See* Garner, *supra,* 53 S. Cal. L. Rev. at 1423 n. 3.

It should be noted that these cases address the problems of labeling and advertising under the aegis of breach of warranty, negligence or fraud causes of action. *See, e.g., Pritchard v. Liggett & Myers, supra,* 295 F.2d at 299-300. Indeed so intertwined is labeling or advertising with any tort causes of action based upon design defects, that the position of defendants Philip Morris and

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nor the final committee reports explicitly address the status of these cases after passage of the Act, congressional debate recognized their continued existence. Often, such recognition took the form of discussion as to the effect of the required warning on the defense of assumption of the risk. Thus, in 1965, Congressman Fascell of Florida expressed his view that

> The legislative record makes it clear that passage of this law and compliance by the manufacturer in no way affects the right to raise the defense of "assumption or [sic] risk" and the legal requirement for such a defense to prevail; nor does it shift the burden of proof, nor could it be considered a legal or factual bar to the plaintiff user.

111 Cong.Rec. 16543-16544 (July 13, 1965). Later, Congressman Fascell clarified his position. In response to Congressman Bolling's opposition to the preemption provisions of the Act, Mr. Fascell stated:

> There might be one consoling factor in the adoption of the conference report. By virtue of the language being required as a result of the law, it would raise the presumption that every company that makes and distributes this process does so with

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Liggett Group, that the Act permitted all tort actions except those based upon labeling and advertising is absurd. *See* Brief of Defendant Philip Morris at 27-28; Brief of defendant Liggett Group at 31-32. Labels and advertisements constitute a manufacturer's public statements about its product; they are a necessary component of any common law tort analysis.

> knowledge. If that is true, it would redound to the benefit of a plaintiff bringing an injury suit.

111 Cong.Rec. 16545 (July 13, 1965). Congressman Fascell thus believed that the warning would ultimately help plaintiffs in cases such as these. *See also* 111 Cong.Rec. 16546 (July 13, 1965) (statement of Rep. Udall). Theodore Ellenbogen, Acting Assistant General Counsel of the Department of Health, Education, and Welfare, testifying before the House Committee on Interstate and Foreign Commerce, disagreed.

> MR. MACKAY: I would like to ask you this as a lawyer. Would not the presence of the type of warning suggested in these bills greatly strengthen the hand of a defendant in a tort case?
>
> MR. ELLENBOGEN: In the long run it might do so, because those cases that I have read—and I have not made a real study of this particular thing—but the *Green* case, for example, is based, I believe, on the implied warranty of fitness, and there being no notice of the health hazard to the consumer.

Hearings on H.R. 2248, supra, at 176. In response to Representatiave Mackay's further inquiries on this topic, a memorandum was supplied to the Committee, reviewing the caselaw, and concluding, as follows:

> Assuming a clear statement, suits based on negligence probably would be barred on three grounds. Having warned the buyer, the manufacturer could not be said to be negligent;

> the buyer is contributorily negligent in using a product he knows might harm him; and having been warned the buyer assumes the risk attendant to the use of the cigarettes . . . actions based on breach of warranty would probably be unsuccessful. When a seller warns a buyer of the possibility of a certain form of injury, it cannot be said that he is warranting that the injury will not occur.

Id. at 178.

Again in 1969, the House Committee on Interstate and Foreign Commerce considered this point at great length. Committee members attempted to show that the tobacco industry's support of the warning then in effect was as a result of the benefits it gained from the undermining of the assumption of the risk defense. *Hearings on H.R. 643, supra,* at 577-78 (colloquy between Rep. Moss and Joseph F. Cullman, III), 579-81 (colloquy between Rep. Dingell and Mr. Cullman), 589 (Colloquy between Rep. Thompson and Mr. Cullman), 589 (colloquy between Rep. Satterfield and Mr. Cullman). Representative Watson disagreed. *Id.* at 579, 582. However, both in 1969, and previously in 1965, all parties assumed the existence of lawsuits such as the instant one. Indeed, the congressional debate as to the validity of certain defenses presupposes such suits. Thus, Congressman Watson was correct when he stated that "nowhere in the Act of 1965 does it preclude an individual or prevent an individual from pursuing a common-law liability, as far as I know . . . ." *Id.* at 579. In fact, in 1965, the Department of Health, Education, and Welfare considered such suits to be "a private matter . . . not regulated by this bill . . . ." *Hearings on H.R. 2248, supra,* at 176 (statement of Theodore Ellenbogen).

The legislative history thus supports plaintiff's position in these respects.[11] Such position is further strengthened by the structure of the statute ultimately passed: although injunctive relief is available if sought by the government, 15 U.S.C. § 1339, and minimal criminal sanctions applicable to violations of the Act, 15 U.S.C. § 1338, the statute is silent as to damage claims. Absent the existence of common law claims such as those asserted by plaintiff, victims of cigarette smoking would thus be left with no remedy at all, a result which is "inconceivable," *Silkwood v. Kerr-McGee Corp., supra,* 104 S.Ct. at 629 (Blackmun, J., dissenting), especially in light of the existence of such claims prior to passage of the Act. Nonetheless, such claims might be preempted notwithstanding this legislative history if it were found either that Congress "occupied the field" or that the existence of such claims creates an actual conflict with the Act. It is these concerns that the court next addresses.

1. Did Congress preempt state common law claims by occupying the field?

As the court has noted earlier, preemption implied from legislative intent may be inferred where Congress "occupied the

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11. It also supports plaintiff's position with respect to the "addiction theory" of Count 9 and the advertising claims of Counts 4 and 5 of plaintiff's complaint. It is true that Congress chose not to address the addiction problem, despite the presentation of "a great deal of scientific testimony" regarding the issue. *See* Brief of Defendant Lowe's Theatres, Inc. at 27, citing legislative history. Nor, however, did it distinguish claims based upon addiction from the others which it chose not to preempt. *See* Garner, *supra,* 53 S. Cal. L. Rev. at 1453-54. Similarly, congressional inaction regarding the recognized dangers associated with cigarette advertising and promotion, *see id.* at 29, citing legislative history, ought not be construed as forbidding damage claims for injuries caused by such advertising and promotion, if such causation can be proved.

field" in a given area. Whether Congress did so may, in turn, be inferred in any of three ways: first, if there is a pervasive scheme of federal regulation in such area; second, if the federal interest in such area is dominant; and third, if the objective of federal law in such area and the obligations imposed by it reveal the same purpose. *See supra* at 1150. Defendants argue that Congress explicitly intended to preempt the field and that, in debate and elsewhere, it demonstrated such intent explicitly and by creating a pervasive scheme of federal regulation to deal with a problem uniquely federal in scope. The court disagrees.

It is true that at least one Senator stated that "[t]he problem of smoking and health is national in scope. It is clearly one in which congress should occupy the field." 111 Cong.Rec. 13930 (June 16, 1965) (statement of Sen. Morton). Other Senators, Representatives and delegates from the tobacco industry, the executive branch, and public interest groups agreed that federal regulation was necessary, in order to avoid a "maze of conflicting regulations" and deal with "a product that is completely in interstate commerce." *See supra* at 1159. Hence, Congress passed a bill purporting "to establish a comprehensive federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331.

The court agrees that Congress thus intended to occupy a field and that it indicated this intent as clearly as it knew how. It utilized the language of preemption; it stated that it was establishing a pervasive scheme of regulation; and it discussed the dominant federal interest in the fields affected by its intended regulation. *See, e.g.*, H.Rep. No. 449, *supra*, at 2351-52 ("The problem has broad implications in the field of public health and health research, and involves potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising

and manufacturing industry, and the numerous businesses which market tobacco products, are involved. Some proposals have been made in this area which might lead to severe curtailing or the possible elimination of cigarette advertising. This could have a serious economic impact on the television, radio, and publishing industries in the United States."); 111 Cong.Rec. 14,423 (June 22,1965) (statement of Rep. Harris) (". . .this is an interstate problem.") However, the legislative history of the Act, as well as its language, persuades the court that the field it occupied does not encompass the common law products liability claims here asserted. That field was expressly limited to "cigarette labeling and advertising with respect to any relationship between smoking and health," 15 U.S.C. § 1331; the preemption provision of the Act proscribes state or local action that would *require* a particular statement on cigarette packages, 15 U.S.C.§ 1334(a), or impose any "requirement or prohibition" with respect to cigarette advertising. 15 U.S.C. § 1334(b). Congress addressed itself to a problem national in scope, and in 1965, and again in 1969, chose to remedy that problem by requiring certain labeling, and regulating advertising, and finally making it "unlawful . . . on any medium of electronic communications subject to the jurisdiction of the Federal Communications Commission." 15 U.S.C. § 1335. It did not, however, address itself to the problem of compensating the victims of cigarette smoking and/or imposing civil liability on cigarette companies. Indeed, the issues are within a different field, that of products liability, the continued existence of which was assumed by Congress, and left for the states. Especially because "federal occupation of a field will not be lightly inferred," Tribe, *supra,* § 6-25, at 384 (citing cases), the fact that two different areas are thus implicated renders preemption improper. *See, e.g., Silkwood v. Kerr-McGee Corp., supra,* 104 S.Ct. at 622-26 (Price-Anderson Act does not preempt state tort law remedies); *Pacific Gas and Electric, supra,* 103 S.Ct. at 1726

(Atomic Energy Act leaves to the states traditional powers to regulate utilities); *Sears-Roebuck & Co. v. San Diego County District Council of Carpenters, supra,* 436 U.S. at 194-97, 98 S.Ct. at 1756-57 (cases relating to labor relations are not preempted if "different from" those presented to the National Labor Relations Board); *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 336, 93 S.Ct. 1590, 1597, 36 L.Ed.2d 280 (1973) (Water Quality Improvement Act does not preempt state common law claims for damages for oil spillage); *Huron Cement Co. v. City of Detroit,* 362 U.S. 440, 445, 80 S.Ct. 813, 817, 4 L.Ed.2d 852 (1960) (Detroit ordinance had different purposes from, and therefore is in a different field than congressional enactments concerning shipping). That the areas are similar begins rather than ends the inquiry; where Congress limits the scope of its enactment and manifests its intent not to interfere with areas beyond that scope, the preemptive effect of such enactment must be similarly proscribed. *See generally Pacific Gas & Electric, supra,* 103 S.Ct. at 1726 ("When the federal government completely occupies a given field or an identifiable portion of it . . . the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.' "), quoting *Rice v. Santa Fe Railroad Corp., supra,* 331 U.S. at 236, 67 S.Ct. at 1155. Admittedly, the areas addressed by plaintiff's complaint, and those within the scope of the Act are related. Cigarette labeling and advertising are at issue in plaintiff's complaint, and the form they take may be affected by this lawsuit, if successful. However, as it did with respect to the Price-Anderson Act and, more explicitly, the Water Quality Improvement Act, Congress, in enacting the Federal Cigarette Labeling Act, intended only that states be precluded from regulating cigarette labeling and advertising. Compensation is, as the court has noted elsewhere, an entirely different matter. *See supra* at 1155-1156. The legislative history demonstrates that Congress assumed that, in appropriate

cases and where liability could be proven, such compensation would be paid, though such cases had failed in the past. It limited the scope of the Act, and especially of the preemption provision to that which it feared would interfere with the operation of the Act, and the health of the tobacco industry—state or local regulation, by statute, ordinance or other official legislative or executive enactment. It correspondingly limited the obligations imposed and the remedies available under the Act to those consonant with this purpose; a particular label was required, 15 U.S.C. § 1333, advertising was regulated, 15 U.S.C. § 1334-35, and reports were called for. 15 U.S.C. § 1337. Only the government can enforce the statute, by criminal prosecution or injunction. 15 U.S.C. § 1338-39.[12] Products liability standards

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12. However, Congress did not create a particularly pervasive or comprehensive regulatory system when enacting the Cigarette Labeling Act. *See* Tribe, *supra*, § 6-25 at 385 (where a multiplicity of federal regulations govern a given field, the pervasiveness of the regulations will help to sustain a conclusion that Congress intend to exercise exclusive control over the subject matter), citing *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 296, 91 S. Ct. 1909, 1922, 29 L.Ed.2d 473 (1971); *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 75 S.Ct. 191, 99 L.Ed. 68 (1954). *See also Fidelity Federal Savings & Loan Association, supra*, 458 U.S. at 153, 102 S.Ct. at 3022. *But see New York Department of Social Services v. Dublino*, 413 U.S. 405, 415, 93 S.Ct. 2507, 2514, 37 L.Ed.2d 688 (1973) (rejecting the contention that "preemption is to be inferred merely from the comprehensive character" of the provisions at issue), *cited in Motor and Equipment Manufacturers Association, Inc. v. E.P.A.*, 627 F.2d 1095, 1107-08 and n. 20 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952, 100 S.Ct. 2917, 64 L.Ed.2d 808 (1980). Here, while defendants are correct that Congress has evinced continuing interest in the area of cigarette smoking, *see* Brief of Defendant Loew's Theatres, Inc. at 33-34, regulation of the area has been considerably less pervasive than in such areas as labor law, interstate trucking and banking, in which preemption was found to exist, or in welfare, the environment, or even nuclear power, in which such preemptive effect has been limited or denied. *See supra* (cases cited in this note); *Silkwood, supra; Pacific Gas & Electric, supra.*

are thus left to the states, and mention of the corresponding private rights of action and damage remedies available to individuals is omitted from the Act. *See generally Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230, 67 S.Ct. at 1152 (field preempted by federal statute determined, in part, by objective thereof) (citing cases); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, supra,* 418 U.S. at 271, 94 S.Ct. at 2774 (field preempted by federal statute determined, in part, by remedies available thereunder). These private rights of action and private remedies, traditionally governed by state law, ought not, therefore, be assumed to be eradicated by the Act. *See Rice, supra,* 331 U.S. at 230, 67 S.Ct. at 1152. Congress did not intend that they be, and this court will not render them so.

2. Does state tort law conflict with the Act?

As in *Silkwood*, the question of preemption here turns ultimately "on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." 104 S.Ct. at 626. *See also Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., supra,* 450 U.S. at 317-18, 101 S.Ct. at 1130. As noted above, a conflict occurs either where compliance with state and federal law is a "physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See supra,* at 1151. However, in general, conflicts ought not lightly be inferred. As the Supreme Court has recently stated, in a diferent context:

> The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. A state regulatory scheme is not

> preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.

Rice v. Norman Williams Co., 458 U.S. 654, 659, 102 S.Ct. 3294, 3299, 73 L.Ed.2d 1042 (1982) (citing cases). Implicitly utilizing this standard, the one federal court that has construed the preemption provision of the Act refused to find a conflict between the goal of uniformity, as embodied therein, and FCC regulation of television broadcasts regarding cigarettes. *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1090-91 (D.C.Cir. 1968), *cert. denied*, 396 U.S. 842, 90 S.Ct. 51, 24 L.Ed.2d 93 (1969) (Bazelon, C.J.).[13] Nonetheless, the question of whether or not New Jersey common law of products liability conflicts with the Act is one of first impression.[14]

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13. The one scholar that has examined this provision has concluded that "[t]he labeling acts manifest neither a congressional intention to preempt courts from granting money judgments nor a conflict between such judicially imposed liability and federal law." Garner, *supra*, 53 S. Cal. L. Rev. at 1454.

14. Defendants are correct that, in addressing this question, the court focuses not upon the purposes of state law, be they regulatory or merely compensatory, but upon the effect of such law. *See, e.g., Perez v. Campbell*, 402 U.S. 637, 650-652, 91 S.Ct. 1704, 1711-12, 29 L.Ed.2d 233 (1971). Thus, the court here examines "first the purposes of the federal law and second the *effect* of the operation of the state law on these purposes." *Finberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (emphasis supplied), citing *Perez, supra*. In this sense, the analysis here undertaken differs from that regarding express preemption, *supra*, at 1153-1156. There, the question was one of whether the New Jersey common law of products liability constituted regulation; the New Jersey courts' characterization of such law is much more relevant to that inquiry.

This question requires that the court first examine the purposes of the Act. As we have seen, as they relate to its preemptive provision, those purposes are essentially two: first, Congress intended to ensure the continued vitality of the tobacco industry, for economic reasons and to preserve freedom of choice for the individual; second, Congress sought to implement this and other goals by making uniform the labeling and advertising requirements imposed upon cigarette manufacturers. Defendants also point to the obvious remedial purposes of the Act, which sought to address the health concerns raised by the Surgeon General's Report, and argue that these purposes are best furthered by a concise and unambiguous warning. It is claimed that all of these purposes will be undermined by the simultaneous existence of state common law claims such as those asserted by plaintiff.

The court first notes that in no event is compliance with both the Act and state law a "physical impossibility." At most, state law imposes liability in the form of damages upon defendants. Payment of such damages, as well as fulfillment of the labeling requirements of the Act, are clearly possible. Indeed, the imposition of criminal liability under the Act, as well as the payment of damages, are both possible. *See, Silkwood, supra,* 104 S.Ct. at 626. Defendants, however, argue that state common law may impose, for example, labeling requirements inconsistent with the Act, rendering compliance with both impossible. This argument is without merit. First, as observed earlier, common law liability does not impose requirements upon any party; rather, it allows parties to choose between risking further liability by not changing their behavior, or attempting to negate such risk by, for example, adding a more stringent label to a cigarette package. Which course of action one takes is a matter of choice; one cannot be enjoined or held criminally liable for the course taken. Hence, no requirement is imposed. As the Court of Appeals for the District

of Columbia has recently stated, in holding that a label found adequate by the Environmental Protection Agency for purposes of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, ("FIFRA") could nonetheless provide the basis for liability under Maryland common law, notwithstanding a preemption clause prohibiting states from imposing different labeling requirements.

> . . .Maryland can be conceived of as having decided that, if it must abide by EPA's determination that a label is adequate, Maryland will nonetheless require manufacturers to bear the risk of any injuries that could have been prevented had Maryland been allowed to require a more detailed label or had Chevron persuaded EPA that a more comprehensive label was needed. The verdict [against Chevron] does not command Chevron to alter its label—the verdict merely tells Chevron that if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label. Chevron can comply with both federal and state law by continuing to use the EPA-approved label and by simultaneously paying damages to successful tort plaintiffs such as Mr. Ferebee.

Ferebee v. Chevron Chemical Co., supra, 736 F.2d at 1541.[15]

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15. Defendant Loew's Theatres, Inc. has attempted to distingish *Ferebee* (Cont'd)

Moreover, even if a verdict against cigarette manufacturers were viewed as imposing a requirement upon them, and the manufacturers thus chose to place an additional warning on, or in their packages, such action would not be incompatible with the Act. Section 1333 makes it unlawful not to place the prescribed warning on cigarette packages; it is silent as to additional information or warnings that might also be included.[16] Hence, it is not "physically impossible" for a cigarette manufacturer to chose to alter its behavior in response to an adverse jury verdict.

Nor does the existence of state common law claims stand as an obstacle to the execution of Congress' intent in passing, and then amending, the Act. Primarily, this is because, as in *Silkwood,* Congress intended that state common law claims survive, and thus, that whatever tension exists between federal regulation of cigarette labeling and advertising and state common law claims be tolerated. 104 S.Ct. at 625. That congressional

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from the instant matter, based primarily upon the regulatory scheme created by FIFRA. It is true that FIFRA, unlike the Federal Cigarette Labeling Act, delegates great responsibility to the states. From this fact, defendant gleans a legislative intent not to preempt state common law claims. While the existence of a state role may be evidence of an intent not to preempt, it is neither the only such evidence, nor necessary to a holding that preemption has not occurred. Just as the court did in *Ferebee,* and in *Silkwood*, this court has examined the legislative history of the Act at issue in great detail. Its conclusion—that preemption is not warranted—is based, as it should be, on that particular history. *See Note, supra,* 12 Stanf. L. Rev. at 208-210. Other cases, such as *Ferebee* and *Silkwood,* state general principles applicable here, but the court recognizes that the results reached in each of those cases are instructive only by analogy.

16. Because the Act carries criminal penalties, it should be strictly construed. *See, e.g., United States v. Bass,* 404 U.S. 336, 348, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971).

intent is, as has been shown, clear: state common law claims existed prior to passage of the Act, were assumed to have a continued existence during the legislative process, and were not eliminated by the passage of the Act. Though it is true that, as defendants argue, even state regulation supplementary to a federal enactment—a characterization not inapposite here—may be preempted by such federal enactment, *see, e.g., Campbell v. Hussey,* 368 U.S. 297, 302, 82 S.Ct. 327, 329, 7 L.Ed.2d 299 (1961); *Cosmetic, Toiletry & Fragrance Association, Inc., v. State of Minnesota,* 440 F.Supp. 1216, 1224 (D.Minn. 1977), *aff'd,* 575 F.2d 1256 (8th Cir. 1978), that is only the case where there is an actual conflict between the two, and the federal enactment is "significantly impeded by the state law." Tribe, *supra,* § 6-24 at 379 and n. 12. No such conflict exists here.

First, Congress' intention that the cigarette industry be allowed to survive, and that the consumer remain free to choose or not to choose to smoke, is not undermined by the imposition of liability upon cigarette companies.[17] That concern was reflected in Congress' decision not to ban cigarettes or cigarette advertising altogether, and to maintain uniform labeling. Congress recognized that liability under state tort law would continue to exist, and did nothing to immunize cigarette manufacturers from such liability. The argument that the imposition of such liability will jeopardize the entire cigarette industry, and with it the nation's economic well-being and its citizens' freedom of choice, is hypothetical and speculative at best. Indeed, even those claims based upon theories of strict products liability, may co-exist with an industry whose development and promotion are to be fostered by congressional action. *See Silkwood, supra,* 104 S.Ct. at 625-26.

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17. The court notes that this is particularly true in light of the failure of prior cases of this sort. *See supra* at 1161-1162 (citing cases).

A fortiori, they exist where, as here, the industry upon which liability is to fall is one which Congress has found responsible for death and disease. In any event, as with nuclear power, the legislative history of the Federal Cigarette Labeling Act reveals a Congress unwilling to deprive individuals of their common law damage remedies, whatever they may be.[18]

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18. Defendants argue that plaintiff's risk-utility claims in particular are preempted in that, since such claims would enable juries to drive the cigarette industry out of business, they conflict with the congressional purpose to ensure the survival of the cigarette industry. *See O'Brien v. Muskin Corp., supra,* 94 N.J. at 184, 463 A.2d 298. This argument misconceives the nature of this claim: risk-utility is one method of taking the first step in deciding whether a strict liability analysis should be applied, by proving the existence of a defect. *O'Brien, supra,* 94 N.J. at 185-86, 463 A.2d 298. *See also Feldman v. Lederle Laboratories, supra,* 97 N.J. at 444 and n. 4, 479 A.2d 374. That method renders a manufacturer strictly liable for injuries suffered as a result of its product, irrespective of whether such manufacturer knew or should have known of the product "defect." *See Feldman, supra,* at 450-51, 479 A.2d 374. However, the method also requires the assessment of many factors—the so-called "Wade factors"—including the reasonableness of the defendant's conduct in failing to improve the product (factor 4) and of the plaintiff's conduct in using it (factors 5 and 6). In particular, risk-utility analysis requires that the jury assess

> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions.

O'Brien, supra, 94 N.J. at 182, 463 A.2d 298, quoting *Cepeda v. Cumberland Engineering Co.*, 76 N.J. 152, 174, 386 A.2d 816 (1978). Hence, reflected in risk-utility analysis is a set of principles traditionally associated with torts based upon negligence. *O'Brien, supra,* 94 N.J. at 181, 463 A.2d 298. More important, age-oid notions of assumption of risk, such as those about which Congress was concerned in debate, *see supra,* at 1162-1163, are contemplated in factor 6, quoted above. The argument then, that this type of analysis was outside the

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Second, as shown above, Congress manifested a deep concern over the possibility that different states or localities would impose different labeling or advertising requirements, thereby both imperiling the tobacco, advertising and related industries, and undermining the "comprehensive federal program" which it sought to implement. Of course, such uniformity would not necessarily be imperiled by a jury verdict against cigarette manufacturers, for such verdict might not result in a corresponding change in behavior on the part of the manufacturers; the choice would be theirs to make. Thus, in other areas in which federal labeling is mandated, or directed by federal agencies, as advertising is under the Act, 15 U.S.C. § 1335-36, state common law liability has nonetheless been allowed to survive. *See, e.g., Ferebee, supra,* 736 F.2d at 1540-52; *Feldman, supra,* 97 N.J. at 461, 479 A.2d 374, citing, *e.g., Brochu v. Ortho Pharmaceutical Corp.,* 642 F.2d 652, 658 (1st Cir. 1981) (drug manufacturer liable under state tort law for failure to warn notwithstanding FDA approval of "uniform" label);[19] *Raymond v. Riegel Textile Corp.,* 484 F.2d

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scope of congressional contemplation, is without merit. Congress abridged no common law cause of action whatsoever in passing the Act. That each such cause of action, and this one in particular, may prove injurious to the cigarette industry is a truism, but one that apparently did not bother Congress.

19. FDA approved warnings thus do not preempt state common law products liability claims *despite* the preemptive effect that has generally been given the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.*. *See generally McDermott v. State of Wisconsin,* 228 U.S. 115, 131-32, 33 S.Ct. 431, 434-35, 57 L.Ed. 754 (1913); *National Women's Health Network v. A.H. Robins Co.,* 545 F. Supp. 1177, 1181 (D. Mass. 1982); *Pharmaceutical Society of the State of New York, Inc. v. Lefkowitz,* 454 F. Supp. 1175, 1179 (S.D.N.Y. 1978) (state labeling laws preempted to the extent they conflict with the Act) (dictum), *aff'd,* 586 F.2d 953 (2d Cir. 1978); *Cosmetic, Toiletry & Fragrance Association, Inc. v. State of Minnesota, supra,* 440 F. Supp. at 1220-25.

1025, 1026-28 (1st Cir. 1973) (state products liability law applied notwithstanding standards promulgated in the Flammable Fabrics Act, 15 U.S.C. § 1191 *et seq.*, which, at that time, contained a broad preemption provision) (citing cases); *Hubbard-Hall Chemical Co. v. Silverman,* 340 F.2d 402, 405 (1st Cir. 1965) (Department of Agriculture approved label did not preempt state tort action for failure to warn, in part because Congress had not occupied the field in this area). Underlying these decisions, is the recognition that compensation for individuals as a result of an injury caused by particular products is not only a right that ought to be abridged only where Congress clearly intended to do so, *see Silkwood, supra,* 104 S.Ct. at 623; *id.* at 629 (Blackmun, J., dissenting); *Raymond v. Riegel Textile Corp., supra,* 484 F.2d at 1028, but also one that does not necessarily interfere with governmental regulation of such products. *See Silkwood, supra,* 104 S.Ct. at 626. Here, too, the notion that unless state common law claims are preempted, cigarette manufacturers will be subjected to multiple and conflicting standards with regard to labeling and advertising, is purely hypothetical. Plaintiffs may not prevail in these lawsuits and, if they do, manufacturers may not respond to such suits by altering their labels or changing their advertising practices. *See Ferebee, supra,* 736 F.2d at 1541. Viewed this way, the payment of compensation to victims of tortious activity on the part of defendants, if it is proved, does not necessarily, or even probably, conflict with the purposes of uniformity that underlie the Act, let alone jeopardize the survival of the tobacco industry.

Indeed, the payment of such compensation may further the remedial purposes of the Act, by, for example, aiding in the exposure of dangers not previously associated with cigarette smoking, encouraging manufacturers or consumers to petition Congress, the FCC or the FTC for reasonable regulatory changes,

or itself pressuring Congress to act. *See Ferebee, supra,* 736 F.2d at 1541-42. Moreover, defendant's argument that, were the Act to result in added warnings, it would dilute the effectiveness of the warnings that now exist, thereby undermining the primary purpose of the Act, is without merit. Congressional concern was focused on a fear that such warnings would become encumbered with qualifications, and the message that cigarette smoking is dangerous be accordingly weakened. *See* S.Rep. No. 195, *supra,* at 4. Congress feared not stronger, but weaker statements; only the former would be encouraged by state tort recoveries.[20] Hence, even industry reaction to a finding of liability would not, in this sense, engender conflict with the Act.

In sum, the payment of compensation to injured individuals in no way creates an actual conflict with the Federal Cigarette Labeling Act, or Congress' goals in enacting it. As Congress has not occupied a field which encompasses common law causes of action, or explicitly stated that it intended to preempt such claims, the court cannot but find that such claims exist now, as they existed prior to passage of the Act. The legislative history of the Act, and its amendment, further confirms that Congress did not intend that such claims be preempted. These claims survive and continue

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20. The court notes in this regard that the House of Representatives has recently passed a measure that would mandate stronger warnings on cigarette packages; these four warnings would be placed on such packages on a rotating basis. In addition to complicating the entire warning scheme, three of these four warnings are longer than the body of the present labeling requirement. *See* 130 Cong. Rec. H9222 (Sept. 10, 1984) (text of H3979, § 4(a)(1)). The court recognizes that this bill represents legislation which remains pending and is therefore of limited value in assessing even Congress' present inclination, let alone that of the Congress which passed the Act here under consideration. Still, the Bill demonstrates a diminished congressional concern with a simple or concise labeling scheme where such scheme does not accurately represent the dangers associated with smoking.

to represent an individual's sole recourse in the event of injury based on cigarette smoking, should that injury be found to have resulted from manufacturers' tortious activity, whether that be in the manufacture, design, advertising or marketing of their undisputably harmful products. Congress did not, despite its solicitousness for the cigarette industry, deprive citizens of this recourse. Nor shall the court, in deference to Congress and with respect for the state common law and individuals' right to invoke it, do so.

CONCLUSION

The arguments presented by the defendants in this case symbolize a common misperception of the function of government regulation and the imposition of standards of conduct which result. It would be inappropriate to conclude that what is not prohibited is permitted or that a minimum standard fixes the maximum as well. It is impossible for the government to codify every act which should not be done or the standards by which every act should be performed. Thus, government has frequently established standards in those areas in which a particular industry has failed to establish its own. But injuries to persons, property and the environment were wrong even before government declared that they were wrong.

Now that government has acted in many areas and decreed safety and quality standards, it would be unfortunate if those directed to do no less, assume that they need do no more. In almost every instance, government standards are meant to fix a level of performance below which one should not fall. However, legal minimums were never intended to supplant moral maximums. Nor were they intended to eliminate pride in quality and craftsmanship or self-imposed standards of health and safety.

Appendix E

In this case the tobacco industry argues that because the warning mandated by Congress prohibits them from doing less, they need not and cannot do more. The court here concludes that the warning of the Surgeon General fixes the minimum. Indeed, indications are that the Surgeon General himself does not view the warning as adequate. For these reasons, persons who claim that the warnings are not adequate and that they have been injured as a result should not be deprived of the opportunity of so proving. By this decision the court does not find that they will succeed, but only that they have the right to present their claims for adjudication.

Defendant's motion for judgment on the pleadings is denied. Plaintiff's motion to strike defendants' preemption defenses is granted. An appropriate order will issue.

APPENDIX F—STATUTORY PROVISIONS INVOLVED

§ 1331. Congressional declaration of policy and purpose

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

§ 1332. Definitions

As used in this chapter—

(1) The term "cigarette" means—

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

(2) The term "commerce" means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; (B) commerce between points in any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; or (C) commerce wholly within the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island.

(3) The term "United States", when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island. The term "State" includes any political division of any State.

(4) The term "package" means a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers.

(5) The term "person" means an individual, partnership, corporation, or any other business or legal entity.

(6) The term "sale or distribution" includes sampling or any other distribution not for sale.

(7) The term "little cigar" means any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of subsection (1) of this section) and as to which one thousand units weigh not more than three pounds.

§ 1333. Labeling; requirement; conspicuous statement

It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health". Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type

in contrast by typography, layout, or color with other printed matter on the package.

§ 1334. Preemption

(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

§ 1335. Unlawful advertisements on medium of electronic communication

After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

§ 1336. Authority of Federal Trade Commission

Action prior to and after July 1, 1971

(a) The Federal Trade Commission shall not take any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising. If at any time on

or after July 1, 1971, the Federal Trade Commission determines it is necessary to take action with respect to such pending trade regulation rule proceeding, it shall notify the Congress of the determination. Such notification shall include the text of the trade regulation rule and a full statement of the basis for such determination. No trade regulation rule adopted in such proceeding may take effect until six months after the Commission has notified the Congress of the text of such rule, in order that the Congress may act if it so desires.

Unfair or deceptive acts or practices

(b) Except as provided in subsection (a) of this section, nothing in this chapter shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.

Issuance of trade regulation rules or requirements for affirmative statements in advertising

(c) Nothing in this chapter shall be construed to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any cigarette advertisement.

§ 1337. Reports to Congress

(a) The Secretary of Health and Human

Services shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) current information in the health consequences of smoking, and (B) such recommendations for legislation as he may deem appropriate.

(b) The Federal Trade Commission shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

§ 1338. Criminal penalty

Any person who violates the provisions of this chapter shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than $10,000.

§ 1339. Injunction proceedings

The several district courts of the United States are invested with jurisdiction, for cause shown, to prevent and restrain violations of this chapter upon the application of the Attorney General of the United States acting through the several United States attorneys in their several districts.

Appendix F

§ 1340. Cigarettes for export

Packages of cigarettes manufactured, imported, or packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this chapter, but such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States.

APPENDIX G—ARTICLE FROM "THE NATION" DATED JUNE 7, 1986

ANTI-CIGARETTE SUITS

Federalism With Smoke and Mirrors

Laurence H. Tribe

In the past few years a wave of lawsuits has crashed against the shores of our beleaguered legal system. Cigarette smokers have gone to court, suing tobacco companies for injuries allegedly caused by years of a deadly habit. If smokers win, cigarette makers may be held accountable for an estimated $80 billion a year in smoking-related losses; cigarette prices may shoot up to $3 a pack, radically reducing smoking and saving millions from premature death.

A major issue in the lawsuits involves the familiar warnings on cigarette packages and in cigarette advertisements. Plaintiffs say that the warnings did not make them adequately aware of the dangers or of the risk of contracting the particular diseases they developed. They also claim that industry advertisements directly challenged or more subtly undercut the warnings, encouraging smokers to disregard health risks. Whatever the merit of those novel legal theories, unless the Supreme Court rules otherwise, plaintiffs could be deprived of the chance to raise them in court.

In a key ruling in April, the U.S. Court of Appeals for the Third Circuit, invoking the doctrine of "implied Federal preemption," ruled that the estate of lifetime smoker Rose Cipollone could not sue tobacco companies on the basis of the new legal theories. Two weeks later a Federal District Court in Boston came to the opposite conclusion. It will soon fall to the Supreme Court

to decide which ruling was correct. Unless the Court reverses the Third Circuit, we will witness a major departure from established principles of federalism, representing yet another in a seemingly endless string of legal and political victories, for the tobacco industry.

The basis for the appellate court's decision—"pre-emption"—is an idea firmly rooted in the Constitution: Article VI's supremacy clause makes Federal law the "supreme law of the land." Thus, when a Federal law and a state law directly conflict, the Federal law controls. What this means when the conflict is more oblique has been the subject of debate for decades. And the pre-emption idea is locked in a tug of war with another basic constitutional concept: the preference in our Federal system for state governments to have broad powers to make and change their legal policies.

So what does all of this have to do with smoking, lawsuits and cigarette packages? It seems that the 1965 and 1969 Federal laws that require package warnings (and made the Surgeon General famous) also provided that "no statement relating to smoking and health [other than the federally specified warning] shall be required" on cigarette packages, and that "no requirement of prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion" of cigarettes. As a result, no state could pass a law ordering cigarette makers to put additional warnings on their packages. Nor could any state force cigarette makers to include a skull and crossbones in their advertisements.

But the tobacco industry takes this agrument one significant step further. It contends that the legislation also prohibits individual lawsuits based on state tort law complaining about the

inadequacy of the warnings or about the cigarette ad campaigns. The industry says that such suits, if successful, would effectively establish a state "requirement" that manufacturers provide additional warnings. Because states cannot directly require the industry to provide more warnings, cigarette makers argue, they cannot hold the companies liable for failing to do so, or for running advertisements that might have tended to undermine the warnings' effectiveness.

However, a liability judgment in a state or Federal court is hardly the same as a requirement that the industry do more than the Federal warning law mandates. If an adequate warning would scare off too much business, the cigarette companies could choose to continue to meet only the Federal minimum and pay damage awards to injured smokers for generations to come. The decision to pursue or reject this policy—to choose whichever path is most prudent—is up to the industry. In either case, as long as it continues to meet the requirements of Federal law, it is free to meet its state-imposed obligations to its customers as it sees fit.

If a state court finds that the industry has not fulfilled its responsibilities to warn consumers, there is no reason for the industry not to take its licking as the rest of American businesses do. In countless other areas manufacturers are first held responsible for the damage that they cause and then are left to choose between paying to increase product safety, paying to increase warnings and restrain their ads, or paying damages to injured consumers. Did Congress mean to exempt the tobacco industry from the same set of pressures and limited options? Did it mean to indemnify this industry from all responsibility for the costs its product imposes on our health care, welfare and tax systems? Laws may be made in smoke-filled rooms, but rarely does Congress grant the exemption from the laws of economics that the cigarette industry claims.

Appendix G

Just what Congress meant when it enacted the pre-emption clause of the cigarette labeling act has troubled the courts. Plaintiffs agrue that if Congress had intended to ban individual damage actions, it would have said so, as it did when it enacted laws on copyright and on pensions (Employee Retirement Income Security Act). Similarly, the tobacco companies contend that if Congress had meant to leave the right to bring tort suits intact, it would have said so, as it did when it included "savings clauses" in laws concerning employee safety (Occupational Safety and Health Act) and mineral lands leasing (such as the Surface Mining Control and Reclamation Act). Both arguments demonstrate the manifest dangers in trying to discern the tune when listening to the sounds of Congressional silence. But, as even the court for the Third Circuit noted, the benefit of the doubt in our Federal system is tilted against Federal pre-emption of state law: the symphonic tie normally goes to the plaintiffs.

Much of the legislative history behind the labeling acts is ambigious, but a recurring chord in the debates is problematic for those who argue that Congress intended to pre-empt all warning-related lawsuits. During the 1965 and 1969 debates, representatives and senators struggled over exactly what impact the warnings might have in suits against cigarette companies. Some lawmakers suggested that warnings could make recovery impossible, inasmuch as consumers so warned "assumed the risk" of smoking; others argued that the warnings would have no impact. Whichever view is correct, if Congress had meant to bar warning-related litigation, that discussion would never have taken place. The issue of how well the prescribed messages warned consumers would arise predominantly in lawsuits challenging the adequacy of the warnings. Even if legislators were only succumbing to cigarette industry demands when they "forced" warnings on tobacco makers—a charge that some critics leveled during the

debates—Congress hardly thought that it was barring warning-related lawsuits altogether.

To be sure, this agrument about Congress' intent does not put the industry's smoke-and-mirrors federalism to rest. For even if Congress did not explictly pre-empt lawsuits against cigarette companies, the industry says, Congress did so implicitly.

Courts often invoke the theory of "implied pre-emption" when Congress has not explictly barred state action but instead has created a comprehensive scheme of Federal regulation that is meant to "occupy the field" that the state would seek to affect. The tobacco industry argues that Congress imposed such a Federal regulatory scheme in the area of cigarette labeling. It is this theory that several courts, including the U.S. Court of Appeals for the Third Circuit, have accepted in ruling for the cigarette makers.

But the Supreme Court and other Federal courts have been hesitant to use the slippery doctrine of implied pre-emption to circumscribe state action or keep litigants out of the state courts. In 1983 the Supreme Court concluded that Federal laws establishing safety regulations for nuclear power plants did not pre-empt a California law that limited plant construction, for economic reasons, until safe disposal of nuclear waste could be arranged. A year later the Court held that the same law, even when boosted by the Price-Anderson Act's limitation of a nuclear plant's civil liability, did not pre-empt a lawsuit by Karen Silkwood's estate, against Kerr-McGee for her radiation-related injuries. In siding with Silkwood, the Supreme Court said, "Whatever compensation standard a state imposes . . . a [nuclear] licensee remains free to continue operating under federal standards and to pay for the injury that results."

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If the Silkwood opinion did not provide enough guidance for the Third Circuit, the court needed only to look to a 1984 opinion by Judge Abner Mikva of the U.S. Court of Appeals for the District of Columbia in a case that concerned a worker's allegations that Chevron, notwithstanding its compliance with Federal labeling laws, had failed to give adequate warning of the dangers posed by the insecticide paraquat, which it produced. The paraquat case involved the very issues central to the cigarette litigation: a Federal warning statute, the absence of express pre-emption, and a plaintiff claiming inadequate warning. It is strange, then, that the Third Circuit's opinion makes no reference to Judge Mikva's careful review of the same set of competing concerns—a review that allowed the plaintiff's suit to proceed.

In the cigarette cases it is clear that Congress intended to occupy a field; the question is, Which one? It is a question the Third Circuit never answered. As other courts have found, a Congressional intent to occupy the health and safety field does not bar state courts from awarding damages for compensatory or economic purposes.

In any event, instead of pinpointing what area Congress meant to pre-empt, the appellate court ruled against the Cipollones, deeming their lawsuit to be at cross-purposes with the Federal cigarette labeling act. The court found that the law's "purpose" was to establish a "comprehensive Federal program to deal with cigarette labeling and advertising," with the goal of avoiding "diverse, nonuniform, and confusing" regulations. But just how does this conflict with the Cipollones' claims? On several occasions—including recent challenges to a local rent control ordinance on the ground that it contravened the anti-price fixing and pro-competition goals of Federal antitrust law, and to a state tax on coal alleged to be opposed to a Federal policy of

encouraging coal use—the Supreme Court has rebuffed the idea that a Congressional aim to foster something like competition or nuclear power can in itself suffice to squelch state action that dampens what Federal law would promote. Even if the purpose of the Federal label law is to foster interstate commerce in cigarettes, it is hard to see how allowing plaintiffs to bring their warning-related lawsuits would imperil that commerce. Tobacco companies may choose not to add any warning, or—as do producers of lawn movers, drill presses and stepladders—they may choose to provide a uniform warning and advertising materials that satisfy the courts and consumers of all fifty states.

It is the broader ramifications of the Third Circuit's ruling that are most ominous. That court's view of pre-emption has the burning force of a prairie fire, and it is hard to see what structures of state compensation would survive the ensuing conflagration. Food, drugs, cosmetics and toxic substances are all governed in some manner by Federal warning laws. If innocent people are injured because of inadequate warnings, or because advertisements downplay the product's dangers, are all of them barred by Federal law from pursuing tort claims in state court? If so, the circuit court's ruling is cause for a knowing snicker in corporate board rooms across the country.

It is true that such litigation is highly controversial. Like the cigarette cases, the food and drug cases have been critized by some as excessive and wasteful. But in our Federal system, reform of litigious excesses should ordinarily come from the states. If state legislatures and courts decide to act to limit or constrain recovery, that is their prerogative. For a Federal appellate court to draw a cloak of immunity over such cases is to overstep its place in our Federal scheme.

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The Third Circuit's decision confers such a sweeping grant of immunity that even cigarette makers, never at a loss for chutzpah in the political realm, would have blushed at asking Congress expressly for such protection: "The point, Congressman Bumpus, is that even if we discover that cigarettes cause X disease, we might want to keep it a secret. And if millions of people get X disease as a result, we certainly don't want anyone to be able to sue us for failing to warn them." Not even a hardened Congressional cynic can envision such an argument winning the day on Capitol Hill.

This is not to say that juries will or should accept plaintiffs' claims that the actual warnings of the actual diseases they contracted (generally heart and lung ailments) were inadequate. There is plenty of information about the health dangers of cigarette smoking. And it is not clear how juries will deal with the plaintiffs' claims that cigarette advertisements undercut the warnings and lured them into smoking. Some may believe the smokers' claims of ignorance and deception; others may choose to believe that the smoker was the cause of his or her own demise, as did a jury in California recently.

But as long as state law permits, the verdicts should be left by courts where they were left by Congress: for juries to decide, based on the particular set of circumstances in each case. To the extent that Rose Cipollone's claim rests on the cigarette industry's failure to tell her what it knew, or on its efforts to preserve smoking's allure against a backdrop of grim statistics and deadly warnings, Congress did not pull the legal rug out from under her twenty years before tobacco pulled the breath from her cancer-devastated lungs.

APPENDIX H—OPINION OF THE COURT IN *HAIGHT, ET AL. V. THE AMERICAN TOBACCO CO., ET AL.*

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

No. 84-2232

ROSALEE HAIGHT, JOHN HAIGHT, ANDREW J. GOODWIN, CHARLES FORBES and JUNE FORBES,

Plaintiffs

v.

THE AMERICAN TOBACCO CO. a division of American Brands, Inc.; BROWN & WILLIAMSON TOBACCO CORPORATION; LORILLARD DIVISION OF LOEW'S THEATRES, INC.; PHILIP MORRIS INCORPORATED; R.J. REYNOLDS INDUSTRIES, INC.; LIGGETT GROUP, INC.; S.S.S.C. & B., INC.; McCANN-ERICKSON, INC.; FOOTE CONE & BELDING, INC.; LEO BURNETT U.S.A.; WELLS, RICH, GREENE, INC.; WILLIAM ESTY COMPANY, INC.; BATTEN, BARTON, DURSTINE & OSBORNE, INC.; THE BLOOM AGENCY; ANCHOR TOBACCO CO.; and HECK'S, INC.,

Defendants

December 26, 1984

COPENHAVER, D.J.:

MEMORANDUM ORDER

This matter is before the court on the plaintiffs' motion to

remand this action to the Circuit Court of Kanawha County, West Virginia.

On May 15, 1984, a complaint was filed in the Circuit Court of Kanawha County, West Virginia. Subsequently, a plaintiff was deleted and a defendant added through the filing of an amended complaint on June 1, 1984.

The plaintiffs include five individual residents of Kanawha County, West Virginia. They allege that as the direct and proximate result of the use of tobacco products, including cigarettes, they suffered serious and permanent physical and psychological injuries. The defendants are assembled into three basic groups; six of the defendants manufacture tobacco products, eight are alleged to promote and advertise tobacco products, and two allegedly distribute tobacco products.

Fourteen counts are raised by the complaint. The first six counts are directed to the defendant manufacturers and allege the intentional omission of material facts, negligence, strict liability, breach of warranty of merchantability, breach of warranty for fitness for purpose, and absolute liability. Counts seven and eight allege intentional omission of material facts and negligence on the part of the advertisers. Counts nine through fourteen contain allegations against the distributors of intentional omission of material facts, negligence, strict liability, breach of warranty of merchantability, breach of warranty for fitness for purpose, and absolute liability.

On June 14, 1984, a joint and separate petition for removal was filed by all defendants removing the action from the Circuit Court of Kanawha County, West Virginia, to the United States District Court for the Southern District of West Virginia. Plaintiffs subsequently filed a motion to remand, alleging improper removal.

Appendix H

FEDERAL QUESTION REMOVAL

A. General Principles

The statute authorizing removal of actions from state to federal courts on the basis of a federal question provides as follows:

> Any civil action of which the district courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

28 U.S.C. § 1441(b). The defendants argue that the action was properly removed to federal court because the claims of the plaintiffs conflict with the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331-1340. The basic claim of the defendants is that the plaintiffs have used artful pleading in an effort to close off defendants' right to a federal forum.

Plaintiffs contend that the Cigarette Labeling and Advertising Act is merely a defense to the complaint and therefore defendants are not entitled to removal. It is noted that plaintiffs' action on its face is not founded on any federal statute.

It is well-settled that the right to remove an action from the state to the federal courts is statutory and dependent on the will of Congress. C. Wright, The Law of Federal Courts, 209 (4th ed. 1983). Section 1441(b) sets forth the removal jurisdiction of the federal courts in cases involving a federal question. With regard to removal based on a federal question, citizenship and residency are immaterial. According to the Supreme Court:

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> Congress has given the lower federal courts jurisdiction to hear, originally or by removal from state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiffs right to relief necessarily depends on resolution of a substantial question of federal law.

Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, 103 S. Ct. 2841, 2856 (1983).

In *Gully v. First National Bank,* 299 U.S. 109 (1936), Justice Cardozo set forth the criteria for determining when a case "arises under the Constitution, treaties, or laws of the United States."

> To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiffs cause of action . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . ., and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal . . . Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiffs cause of action and anticipates

or replies to a probable defense.

Gully, 299 U.S. at 112-113.

Several principles have thus evolved for use in determining whether a case involves a federal question warranting removal. According to the well-pleaded complaint doctrine, the existence of a federal question must appear on the face of plaintiff's complaint. *See, e.g., Phillips Petroleum Co. v. Texaco, Inc.,* 415 U.S. 125, 129 (1974); *Gully v. First National Bank,* 299 U.S. at 112-113; *Taylor v. Anderson,* 234 U.S. 74, 75-76 (1914). A defendant's assertion of an issue of federal law in the pleadings or in the petition for removal does not create a federal question. *See, e.g., Phillips Petroleum Co.,* 415 U.S. at 127, 128. The general rule is that plaintiff is the master of his claim and may accordingly choose not to assert a federal right that is available and instead rely only on state law. *See, e.g.. Pan American Petroleum Corp. v. Superior Court,* 366 U.S. 656, 663 (1961); *People of the State of Illinois v. Kerr McGee Chemical Corp.,* 677 F.2d 571, 575 (7th Cir.), *cert. denied,* 459 U.S. 1049 (1982); *Greenshields v. Warren Petroleum Corp.,* 248 F.2d 61, 65 (10th Cir. 1957). Finally, the removal statute should be construed narrowly and against removal. *See, e.g.. La Chemise Lacoste v. Alligator Co.,* 506 F.2d 339, 344 (3d Cir. 1974), *cert. denied,* 421 U.S. 937 (1975). This has been the policy of the Congress since 1877 when the removal jurisdiction of the federal court was reduced. The Supreme Court has not seen fit to expand removal jurisdiction. *Phillips Petroleum Co.,* 415 U.S. 127-128; *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108 (1941).

Exceptions have developed in that some courts have indicated that plaintiffs will not be permitted to use artful pleading to close off a defendant's right to a federal forum *Yawn v. Southern*

Railway, Co., 591 F.2d 312 (5th Cir. 1979), *cert. denied*, 442 U.S. 934 (1978) (plaintiff employees did not artfully plead a nonremovable cause of action in order to avoid the grievance and arbitration procedures of the Railway Labor Act); *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219 (5th Cir. 1976) (a party may not fraudulently evade removal by drafting a complaint so that the true purpose of the action is disguised); *Salveson v. Western States Bankcard Association*, 525 F. Supp. 566 (N.D. Cal. 1981) (court entitled to assure itself that the plaintiff has not through artful pleading sought to defeat the defendant's right to a federal forum); *City of Winston-Salem v. Chauffeurs, Teamsters & Helpers Local Union No. 391*, 470 F. Supp. 442 (M.D.N.C. 1979) (removal may not be avoided by an artful attempt to conceal the federal questions); *Bailey v. First Federal Savings & Loan Association of Ottawa*, 467 F. Supp. 1139 (C.D. Ill. 1979), *appeal dismissed*, 636 F.2d 1221 (7th Cir. 1980) (court may look beyond the language of the state complaint and take judicial notice of federal statutes which necessarily preempt state law); *State of New York v. Local 1115 Joint Board, Nursing Home & Hospital Employees Div.*, 412 F. Supp. 720 (E.D.N.Y. 1976) (caveat to rule that plaintiff is master of his claim is that a plaintiff may not by artful pleading cast a federal claim in terms of state law and defeat removal). Other courts have also found that irrespective of plaintiff's characterizations of the action, the court will look to the substance of the complaint. *Vitarroz Corp. v. Borden, Inc.*, 644 F.2d 960 (2d Cir. 1981) (A plaintiff of an ambiguous claim may not assert his preference for a state forum after allowing a removed case to remain in federal court for some time without resisting; *In re Carter*, 618 F.2d 1093 (5th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981) (court looks to substance of complaint and not the labels used — allegations found to state a substantial federal claim under Labor Management Relations Act); *Clinton v. Hueston*, 308 F.2d 908 (5th Cir. 1962) (despite fact that

complaint brought in state court characterized allegations of wrongful assessment and expenditure of union funds and false reporting by officers of a union local in terms of state law, the claim necessarily was federal in nature because it involved rights defined and protected by the Landrum-Griffin Act). As one commentator has noted, the concept of "artful pleading" has added greater difficulty to an already subtle area of law. C. Wright, Law of Federal Courts, pp. 215, 217 (4th ed. 1983).

B. The Cigarette Labeling and Advertising Act

The defendants argue that the court should look past plaintiffs' characterization of the claim and recognize that the validity, construction and effect of the Cigarette Labeling and Advertising Act are essential elements of the plaintiffs' action. The Cigarette Labeling and Advertising Act was signed into law on July 27, 1965. The Congressional declaration of policy and purpose was stated as follows:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby —
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising

> regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

In pertinent part the Act provided that:

> It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

15 U.S.C. § 1333.

In 1970, the Act was amended to require the package warning to state "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." 15 U.S.C. § 1333.

The Act also provides for uniformity as follows:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on

> smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334.

C. Discussion

The defendants insist that the plaintiffs' complaint requires the court to interpret, construe and apply distinctive federal policies and principles. In this products liability action, plaintiffs have the burden of proving that the defendants breached their duty to exercise reasonable care. *Morningstar v. Black & Decker Manufacturing Co.*, 253 S.E. 2d 666 (W. Va. 1979). An examination of the complaint shows that the action is grounded, in part, on the assertion that defendants breached their duty because of failure to warn consumers about the health hazards and addictive nature of tobacco. The complaint provides that the defendants did not warn of "(a) the inherent and potential hazards of tobacco products, (b) the contraindications of using tobacco products, (c) the physical and psychological dependence plaintiffs would suffer as a result of tobacco products use, (d) early warning signs of adverse reactions to tobacco products, and (e) other material information concerning tobacco products." Thus, the defendants argue that the adequacy of the federally mandated warning is a primary issue. Defendants' Supplemental Memorandum at 4.

Defendants cite several cases in support of their argument that the court must apply and consider distinctive federal policies and principles in order to adjudicate the plaintiffs' claims. In *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981),

the Supreme Court, in a case concerned with the doctrine of res judicata, appeared to acknowledge the concept of artful pleading. In a footnote, the Court commented as follows:

> As one treatise puts it, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization."

452 U.S. at 397 n.2. In *Moitie,* the plaintiffs had originally brought antitrust suits in federal court. The actions were dismissed for lack of standing. Plaintiffs chose not to appeal the dismissal. Instead, an action was filed in state court which purported to raise only state law claims. The allegations were substantially similar to those first brought in federal court. Removal was held proper and the Supreme Court affirmed, stating in a footnote that "[w]e agree that at least some of the claims had a sufficient federal character to support removal." 452 U.S. at 397 n.2.

One commentator has noted that the *Moitie* footnote has added confusion to "an area in which the distinctions are extremely subtle." C. Wright, Law of Federal Courts 215 (4th ed. 1983). Indeed, there are several difficulties with using the footnote as authority for the removal argument in the instant case. As has been stated:

> It is not clear what the Court meant by "artful pleading" when the plaintiff could plead substantially the same theories under either state or federal law. The Court may have used the term to mean bringing essentially the same claims in state

court on state theories as they had in federal court, after the earlier federal actions had been dismissed. The Court's concern with protecting plaintiffs' state forum choice probably was lessened by their prior choice of a federal forum.

The Court did not refer to the problem created by the fact that federal antitrust law falls within the exclusive jurisdiction of the federal courts. The Court may not have felt that was a bar to removal because the peculiar facts of this action met, in substance, the basic requirements of removal jurisdiction. Essentially the same action could have been brought both in state court, under state law, and in federal court, under federal law, despite the latter's exclusive federal jurisdiction.

In brief, the Court's only intention in its footnote may have been a narrow one: to tip the balance in favor of defendant's right to a federal forum and against plaintiff's right to be master of his claim in antitrust actions when the plaintiff already had availed himself of a federal forum and when his state claims as removed would be res judicata from the earlier federal decision. The Court's holding in the case, which affirmed a broad and strict standard for res judicata, seems to lend weight to this view.

C. Wright, A. Miller, E. Cooper, 14 Federal Practice and Procedure § 3722 at 202-203 (Supp. 1982) (hereinafter Wright & Miller).

Clearly, *Moitie* presented a factual situation different from the one at hand. The plaintiffs in this action have never attempted to avail themselves of a federal forum, nor have they evidenced a desire to proceed under federal law. Rather, their claims are grounded on state law.

Defendants rely on *Hunter Douglas, Inc. v. Sheet Metal Workers International,* 714 F.2d 342 (4th Cir. 1983), for the proposition that a federal question arises because adjudication requires the *construction* of a federal statute. In *Hunter Douglas,* a state action was brought by the employer seeking a declaratory judgment that a union was precluded from litigating or compelling arbitration on the issue of whether polygraph testing was permitted under the collective bargaining agreement. The Fourth Circuit held that the action was removable as a federal question under section 301 of the Labor Management Relations Act (LMRA). Although the complaint was phrased entirely under state law, the court found that the action was in fact one to determine the arbitrability of a contract dispute and therefore cognizable under the Labor Management Relations Act. *Hunter Douglas* is distinguishable from the present action because the LMRA, unlike the Cigarette Labeling and Advertising Act, sets forth in detail the rights and duties of employers and employees, provides administrative and judicial mechanisms for resolving disputes, and specifically provides for federal court jurisdiction over "[s]uits for violations of contracts between an employer and a labor organization . . . ." 29 U.S.C.A. § 185(a).

In *Schroeder v. Trans World Airlines, Inc.,* 702 F.2d 189 (9th Cir. 1983), the court held removal to be proper when airline employees brought an action in state court against the employer for wrongful demotions. The court stated that "the principle that plaintiff is the master of his complaint and free to decide the

forum in which to bring an action is not without limitation." *Schroeder,* 702 F.2d at 191. The applicable statute found to establish the existence of a federal question was the Railway Labor Act, 45 U.S.C. § 181 *et seq.* Like the LMRA in *Hunter Douglas,* the Railway Labor Act established a broad comprehensive scheme with administrative and judicial dispute resolution mechanisms. Once grievances have been heard according to the arbitration procedures set forth in the Act, exclusive jurisdiction rests with the federal court. *Schroeder,* 702 F.2d at 192. The Cigarette Labeling and Advertising Act defines no rights and provides no mechanisms for the enforcement and protection of individual rights.

Similarly, the Federal Aviation Act of 1958, 49 U.S.C. § 1373 *et seq.,* may raise a federal question. In *North American Phillips Corp. v. Emery Air Freight Corp.,* 579 F.2d 229 (2d Cir. 1978), an action was brought in state court against an air carrier for the value of lost cargo. The Second Circuit held that removal was proper despite lack of reference to any federal law in the complaint. The broad comprehensive scheme covering interstate shipment of freight to the exclusion of state law was noted. Additionally, a carrier's valid federal tariffs govern the nature and extent of liability as well as the nature and extent of a shipper's right of recovery. *North American Phillips Corp.,* 579 F.2d at 233. The Act is thus distinguishable from the Cigarette Labeling and Advertising Act.

Defendants have also relied on *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists,* 376 F.2d 337 (6th Cir. 1967), *aff'd,* 390 U.S. 557 (1968). The question presented in *Avco* was whether an action seeking to enjoin a breach of a no-strike provision of a collective bargaining agreement may be removed from state to federal court under 28 U.S.C. § 1441(b).

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The petitioners in *Avco* had filed an action in state court alleging that it had a valid contract with the union which governed work stoppages, strikes, or slowdowns and that the union had violated the contract. The company argued that the action was not within the scope of removal because it was based solely upon a state created breach of contract right. The Sixth Circuit observed that if the company had invoked it, there would have been a federal cause of action under § 301 of the Labor Management Relations Act. It was noted that state law does not exist as an independent source of private rights to enforce a collective bargaining agreement. The Sixth Circuit found that the force of federal preemption in the area of labor law cannot be avoided by failing to mention section 301 in the complaint. Thus, it was held that the petitioner's action "arose under" § 301 and could be removed to federal court.

The *Avco* situation is quite unlike that presented by the plaintiff's products liability claims. *Avco* represents a situation wherein federal law has taken over an area and made it inherently federal. Federal law in the labor contract cases is not merely a defense to the state contract claim or theory. Rather, federal law is the basis of all rights of action under the collective bargaining agreement. Indeed, as the Supreme Court has noted: "*Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal action necessarily 'arises under' federal law." *Franchise Tax Board,* 103 S. Ct. at 2854.

It simply does not appear from the legislative history that the Cigarette Labeling and Advertising Act was meant to create a comprehensive regulatory system such that any state court products liability action which would necessitate at some point in the proceedings the interpretation or application of the Cigarette

Labeling and Advertising Act arises under the laws of the United States. *See Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1168-1169 (D.N.J. 1984). The area occupied was limited to "cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331. As concluded in *Cipollone,* the legislative history of the Act, as well as its language, persuades the court that the field it occupied does not encompass the common law products liability claims here asserted. 593 F. Supp. at 1164.

It is plain that in some instances, as the defendants argue, the need for the construction, interpretation and application of a federal law will support federal question jurisdiction under the removal statute even though it may not provide a complete preemption of state law. Defendants' Supplemental Memorandum at 2. However, as discussed above, the cases supporting that proposition involve circumstances wholly unlike those presented in the present action.

D. Conclusion

There is nothing within the text of the Cigarette Labeling and Advertising Act which suggests that congressional intent was to limit the tobacco industry's common law duties to consumers. In *Cipollone,* the court, after an exhaustive review of the legislative history, concluded that "state common law claims existed prior to passage of the Act, were assumed to have a continued existence during the legislative process and were not eliminated by the passage of the Act." *Cipollone,* 593 F. Supp. at 1168.

The *Cipollone* case involved preemption and not federal question jurisdiction, which is the matter presently before the court. Although the defendants' initial memorandum was

somewhat ambiguous on the question of preemption, it is now clear that preemption is not an issue that has been raised by the defendant. Defendants' Supplemental Memorandum at 2, 3.

It is observed that section 1441's removal jurisdiction and the "arising under" concept involve complex issues with extremely subtle distinctions which impact upon the interrelationship of state and federal authority, the structural foundation of the federal system and the proper management of the judicial system. Those subtleties have contributed to conceptual difficulties regarding the arguments made by both parties. Some of those difficulties perhaps result from the fact that preemption is used in the case law in more than one sense. As Wright has indicated:

> In many instances pre-existing state rights of action are cut off by federal law. In these situations preemption is a defense to the state claim, and the rule that jurisdiction must be based on the complaint rather than on defenses is enough to defeat removal. There are other situations, however, of which § 301 of the Taft-Hartley Act is the most conspicuous, in which it is held that federal law has taken over an entire subject matter and made it inherently federal . . . Federal law . . . is the basis of all rights of action . . . If state law has been preempted in this sense, so that a state right of action has been replaced by a federal right of action, plaintiff necessarily is stating a federal claim whether he wishes to do so or not, and the case is removable.

C. Wright, Law of Federal Courts, 216 (4th ed. 1984).

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Several of the cases cited by defendants in support of their federal question argument seem to fall into the second category identified by Wright. Indeed, Wright indicates that there is problematic overlap in the areas of federal question and preemption. The plaintiffs, on the other hand, are arguing that the Cigarette Labeling and Advertising Act is merely a defense to the state claim such that removal is defeated.

Consequently, the court deems it appropriate to treat preemption as an apparent issue. Federal law may expressly preempt state law or have an implied preemptive effect if it occupies the field. *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615, 621 (1984), *citing Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713 (1983); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 485 U.S. 141 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). State law may also be preempted to the extent it conflicts with federal law such that compliance with both laws is impossible. *Silkwood*, 104 S. Ct. at 621, citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). Finally, preemption may take place where state law is an obstacle to the achievement of Congressional goals and purposes. *Silkwood*, 104 S. Ct. at 621, *citing Hines v. Davidowitz*, 312 U.S. 52 (1941). Although state common law is susceptible of preemption, there is a presumption against preemption in areas of traditional state power such as tort law. *Pacific Gas & Electric*, 103 S. Ct. at 1723.

After a complete and comprehensive analysis of the law and legislative history, the court in *Cipollone* concluded that the Cigarette Labeling and Advertising Act did not expressly or impliedly preempt common law tort claims, 593 F. Supp. at 1156, 1163. Of particular significance is legislative history that indicates that Congress recognized the continued existence of product

liability cases based upon state common law prior to passage and the amendment of the Cigarette Labeling and Advertising Act. *Cipollone,* 593 F. Supp. at 1161-1163. Nothing was done to immunize the cigarette industry from liability. In passing the Act, Congress occupied only the field of regulating cigarette labeling and advertising. Compensation through state product liability law is an entirely different matter. Common law liability mandates no regulatory requirements that conflict with or impede the purpose of the Act. The imposition of liability may have the effect that the cigarette industry may choose to change its behavior by adding supplementary health information. However, the altering of behavior is purely hypothetical. The court finds that the *Cipollone* decision is well-reasoned and instructive. As noted in *Cipollone:*

> In sum, the payment of compensation to injured individuals in no way creates an actual conflict with the Federal Cigarette Labeling Act, or Congress' goals in enacting it. As Congress has not occupied a field which encompasses common law causes of action, or explicitly stated that it intended to preempt such claims, the court cannot but find that such claims exist now, as they existed prior to passage of the Act. The legislative history of the Act, and its amendment, further confirms that Congress did not intend that such claims be preempted. These claims survive and continue to represent an individual's sole recourse in the event of injury based on cigarette smoking, should that injury be found to have resulted from manufacturers' tortious activity, whether that be in the manufacture, design, advertising or marketing of these undisputedly harmful products.

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Congress did not, despite its solicitousness for the cigarette industry, deprive citizens of the recourse.

Cipollone, 593 F. Supp. at 1170.

The Cigarette Labeling and Advertising Act simply establishes a uniform warning and, in the interests of commerce and the national economy, restricts states from imposing separate warning requirements. It was thought that commerce and the national economy would be impeded "by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(2). The Act does not prohibit state common law products liability claims. *Cipollone,* 593 F. Supp. at 1156, 1170. Indeed, it simply does not address the issue. It seems plain that the reason the Act would need to be construed in this action is because the defendants are using it as a defense in an effort to claim that the duty to exercise reasonable care and to give adequate warnings was met through compliance with the Act. Compliance with statutory mandates is a standard defense in products liability cases. See generally 1A Frumer & Friedman, Products Liability, § 507[1] (1983 & April Supp. 1984); Restatement (Second) of Torts, § 288(c) (1965) ("[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions"); *Ferebee v. Chevron Chemical Co.,* 736 F. 2d 1529 (D.C. Cir. 1984) (rejecting a preemption argument and holding, in part, that provisions of the Federal Insecticide, Fungicide, and Rodenticide Act mandating that a state shall not impose or continue in effect any requirements for labeling in addition to those required under the Act does not preempt state tort suits based on inadequacy of a label approved by the Environmental Protection Agency). "[S]ince 1887 it has been settled law that a case may not be

removed to federal court on the basis of a federal defense, including the defense of preemption . . . ." *Franchise Tax Board,* 103 S. Ct. 2841, 2848 (1983) (holding, in part, that a suit by state tax authorities under a state statute permitting them to collect unpaid income taxes by levying on funds held in trust for the taxpayers under and ERISA-covered vacation benefit plan does not "arise under" ERISA and is not within the removal jurisdiction conferred by 28 U.S.C. § 1441).

The policy and stated purpose of the Cigarette Labeling and Advertising Act, which is to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, was not to be impeded by diverse, non-uniform and confusing labeling and advertising regulations. An examination of the legislative history makes it plain enough that the limitations were imposed to insure that the statement required by the Act would not be weakened of diluted. It was the Congressional intent that the label not become cluttered or encumbered with qualification.

The court observes that although the impact of a successful state tort law action may persuade those in business to respond to common law claims by adding stronger warnings, package inserts, or changing their advertising practices, that would not be a "requirement" imposed upon them. The choice remains theirs. Thus, such an action would not be in conflict with the Act which is silent as to any voluntary additional warnings of information.

This is not a case in which plaintiffs have resorted to artful pleading in an effort to defeat a congressional intent that the exclusice source of relief be federal law. Nor does this appear to be a case in which plaintiffs have fraudulently or artfully

manipulated the complaint in an effort to avoid application of federal substantive law by a federal forum. Plaintiffs neither rely upon nor challenge the Act. However, the Act may be used for purposes of defense. Inasmuch as federal law does not supply an essential element of the claim, removal under § 1441(b) is not appropriate.

SEPARATE AND INDEPENDENT CAUSES OF ACTION

Defendants contend that the plaintiffs' amended complaint presents separate and independent claims warranting removal pursuant to 28 U.S.C. § 1441(c) which provides as follows:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims of causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1441(c).

Both plaintiffs and defendants have relied on the leading judicial construction and only Supreme Court consideration of § 1441(c). *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). In *Finn*, a Texas citizen brought suit in a Texas court against two foreign insurance companies and their Texas agent. The plaintiff claimed recovery for fire loss either on one or the other insurance policy or because the agent was liable for failure to keep the property insured. The insurers, relying on § 1441(c),

removed to federal court. Judgment was entered against one of the insurance companies. That company then attempted to have the judgment vacated on the basis of improper removal. The district court sustained removal. The Supreme Court reversed.

The predecessor to § 1441(c) had provided that if there were "a controversy . . . wholly between citizens of different states," the suit could be removed. 28 U.S.C. § 71 (1940). In *Finn,* the Court examined the effect of the change in language from "controversy" to a "separate and independent claim or cause of action." The Court noted that:

> In § 71 the removable "controversy" was interpreted as any possible separate suit that a litigant might properly bring in a federal court so long as it was wholly between citizens of different states. So, before the revision, when a suit in a state court had such a separable federally cognizable controversy, the entire suit might be removed to the federal court.
>
> A separable controversy is no longer an adequate ground for removal unless it also constitutes a separate and independent claim or cause of action.

Finn, 341 U.S. at 11 (citations omitted).

The Court described a cause of action by quoting its language from a previous opinion:

> "Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury

> was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex."
>
> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show."

Finn, 341 U.S. at 13, *quoting Balitmore S.S. Co. v. Phillips,* 274 U.S. 316, 321 (1926).

The Court restrictively read § 1441(c) and found that a purpose of Congress was to reduce the number of cases removable from state court. *Finn,* 341 U.S. at 12. The Court concluded:

> [W]here there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c).

Finn, 341 U.S. at 14.

An examination of cases cited in *Finn* as not containing separate and independent causes of action and thus not subject to removal under section 1441(c) is helpful in deciding the matter presently at issue. *Finn,* 341 U.S. at 12, n.5 [stating that *Pullman Co. v. Jenkins,* 305 U.S. 534 (1938), and *Barney v. Latham,* 103 U.S. 205 (1880), do not contain separate and independent causes

of action and would not be removable under § 1441].

Pullman involved a widow's suit filed in state court for the wrongful death of her husband who had been a train conductor. The husband was killed when he was struck by a drunk passenger. The complaint alleged negligence against the railroad for allowing the drunk passenger through its gates. Negligence was also alleged against the Pullman Company and its porter for allowing the drunk passenger on the train. The Pullman Company removed, asserting that the claim against it and its porter was a controversy separate from that against the railroad. According to *Finn* these two claims, involving distinct acts at different times, would not be considered separate and independent causes of action and "would not now be removable under 28 U.S.C § 1441." *Finn,* 341 U.S. at 12, n.5.

In *Barney,* the Court had previously held that there were separable controversies in a state court suit against a local corporation and nonresident individuals for an accounting on land sales. One group of sales was by the nonresidents before conveyance to the corporation. The other group of sales was by the corporation after conveyance. The Court in *Finn* stated that *Barney* would not now be removable as a separate and independent cause of action. *Finn,* 341 U.S. at 12, n5.

Defendants make four arguments in support of their position that plaintiffs' claims are substantively separate. First, defendants argue that plaintiffs allege injury for more than one incident. Second, the plaintiffs seek separate recoveries for separate wrongs. Third, that the claims against the defendant advertisers are separate and independent from the claims against both the manufacturers and the distributors. Fourth, that the claims against the manufacturers and the distributors allege the breach of different duties and thereby claim different wrongs.

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Although defendants' arguments have some superficial appeal for which some authorities exists, the greater weight of precedent would deny removal. See 14 Wright & Miller § 3724, notes 36-46 (1976 & Supp. 1983). Additionally, developments since *Finn* have, at best, contributed nothing to the clarity of the concepts involved and, at worst, simply added to their ambiguity. The *Finn* transactional view of a cause of action is consistent with the liberal rules of pleading and practice.

This products liability action in essence alleges injuries sustained by the plaintiffs as a result of the purchase and consumption of tobacco products. The purchase and consumption allegedly resulted from three levels of interlocked activity. The three levels of activity involve production (manufacturers), promotion (advertisers), and sales (distributors). All three groups participate in making tobacco available for purchase and consumption. There is one harm allegedly suffered: injury from the use of tobacco products. The fact that each group of defendants may have been responsible for a different activity in producing, promoting and selling the final product does not convert this action into one consisting of separate and independent claims. The two causes of action against the advertisers, intentional omission of material facts and negligence, are also asserted against both the manufacturers and the distributors. All of the causes of action alleged against the manufacturers are also alleged against the distributors. The complaint alleges harm to the single right of bodily safety. In the case at bar, several theories are asserted against the defendants, but that does not change the case into an action seeking redress for several wrongs. The interdependant as opposed to independent nature of the transactions involved is underscored by the defendants' reliance on the Cigarette Labeling and Advertising Act. The court concludes that the claims against the defendant manufacturers and advertisers, who are

alleged to be foreign corporations doing business in West Virginia, are not "separate and independent" from the causes of action stated against the distributors, who are West Virginia corporations.

Accordingly, for the reasons stated above, it is ORDERED that plaintiffs' motion to remand be, and it hereby is, granted, and that this civil action be, and it hereby is, remanded to the Circuit Court of Kanawha County, West Virginia.

There being nothing further remaining for disposition in this action, it is further ORDERED that this case be stricken from the docket of the court.

This Opinion on Motion to Vacate of the United States Court of Appeals for the Third Circuit is printed here due to late reception of this document.

APPENDIX I — OPINION ON MOTION TO VACATE OF THIRD CIRCUIT COURT OF APPEALS FILED SEPTEMBER 29, 1986

UNITED STATE COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 85-5073 and 85-5074

ANTONIO CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone

vs.

LIGGETT GROUP, INC., etc.

Liggett Group, Inc., Appellant in No. 85-5073
Loew's Theatres, Inc.,
Appellant in No.85-5074

PRESENT: GIBBONS, SLOVITER and STAPLETON,
Circuit Judges

OPINION ON MOTION TO VACATE

(Filed September 29, 1986)

GIBBONS, *Circuit Judge:*

Antonio Cipollone, individually and as an Executor of the Estate of Rose D. Cipollone, asks this court to vacate its judgment and opinion in *Cipollone v. Liggett Group*, 789 F.2d 181 (3d Cir. 1981). Cipollone alleges that one member of the panel that decided that appeal, the Honorable James Hunter, III, should have recused himself because his participation created an appearance of partiality. We deny the motion.

Appendix I

The underlying case is a products liability action in which Cipollone seeks money damages from several cigarette manufacturers for cigarette-induced injury and death. In an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)(1982), the panel held that some of Cipollone's claims are preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341 (1982). That Act was passed in 1965, Pub. L. 89-92, July 27, 1965, 79 Stat. 282.

Judge Hunter was appointed to this Court in 1971. Cipollone contends that an appearance of partiality arose because Judge Hunter, while in private practice, represented The American Tobacco Company in a case involving a similar products liability claim. That case, *Lapp v. American Tobacco Company*, No. L-21590-63 (N.J. Super. Ct. Law Div.) was filed in the Superior Court of New Jersey in 1964, and was terminated, as to American Tobacco Company, on February 10, 1966. American Tobacco Company is not a defendant in Cipollone's case. Furthermore, the preemptive effect of the Federal Cigarette Labeling and Advertising Act could not have been an issue in the *Lapp* case, since the events giving rise to that action occurred before the passage of that Act.

Even if American Tobacco Company were a party to the Cipollone case, the long passage of time since Judge Hunter's last representation of that Company requires the conclusion that no reasonable person could question his impartiality. *See, e.g., Chitimacha Tribe of Louisiana v. Harry L. Laws Company, Inc.*, 690 F.2d 1157, 1166 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983)(recusal not warranted where judge had represented the defendant in unrelated matters at least six years earlier); *Jenkins v. Bordenkircher*, 611 F.2d 162, 165-67 (6th Cir. 1979), *cert. denied*, 446 U.S. 943 (1980)(recusal not required where trial judge had prosecuted defendant for several unrelated crimes

during the period four to thirteen years prior to the time of trial); *Gravenmier v. United States*, 469 F.2d 66, 67 (9th Cir. 1972)(where trial judge was of counsel in prior prosecution six years before present unrelated prosecution, recusal not required); *Darlington v. Studebaker-Packard Corp.*, 261 F.2d 903, 906 (7th Cir.), *cert. denied*, 359 U.S. 992 (1959)(recusal not warranted where trial judge had represented defendant in unrelated matters for a period of four to five years which ended three to four years before judge's decision); *Royal Air Maroc v. Servair, Inc.*, 603 F.Supp. 836 (S.D.N.Y 1985) (prior representation by trial judge of defendant's parent corporation in unrelated matter twelve years earlier no basis for recusal).

Cipollone contends that even though Judge Hunter has no relationship, professional or otherwise, with any party to this appeal, his impartiality may reasonably be questioned because of his prior knowledge of the issues it presents. As noted above, the preemption issue on which this appeal turns was not presented in the *Lapp* case. Thus there is no factual nexus between the prior representation about which Cipollone complains and the issues which Judge Hunter resolved. In any event, prior knowledge about legal issues is not a ground for recusal of a Judge. Section 445(b)(1) provides that a judge shall also disqualify himself where he has "personal knowledge of disputed evidentiary facts" concerning the proceeding. *Plechner v. Widener College, Inc.*, 569 F.2d 1250, 1263 (3d Cir. 1977). Cipollone does not assert that Judge Hunter has knowledge of evidentiary facts. If Judges could be disqualified because their background in the practice of law gave them knowledge of the legal issues which might be presented in cases coming before them, then only the least informed and worst-prepared lawyers could be appointed to the bench.

Appendix I

The motion to vacate the judgment and opinion in *Cipollone v. Liggett Group*, 789 F.2d 181 (3d Cir. 1981), will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit